

Detroit Newspaper Agency, d/b/a Detroit Newspapers,¹ The Detroit News, Inc., and The Detroit Free Press, Inc. and Detroit Typographical Union No. 18, Communications Workers of America, AFL-CIO and Newspaper Guild of Detroit, Local 22, The Newspaper Guild, AFL-CIO and Detroit Mailers Union No. 2040, International Brotherhood of Teamsters, AFL-CIO; GCIU Local Union No. 13N, Graphic Communications International Union, AFL-CIO; GCIU Local Union No. 289, Graphic Communications International Union, AFL-CIO; Newspaper Guild of Detroit, Local 22, The Newspaper Guild, AFL-CIO; Teamsters Local No. 372, International Brotherhood of Teamsters, AFL-CIO and CWA/ITU Negotiated Pension Plan. Cases 7-CA-37361, 7-CA-37417, 7-CA-37427, 7-CA-37606, 7-CA-37385, 7-CA-37783, 7-CA-38185, 7-CA-38442, and 7-CA-38184¹

August 27, 1998

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX, LIEBMAN, HURTGEN, AND BRAME

This case presents several unfair labor practice issues arising from 1995 collective-bargaining negotiations, and an accompanying strike, involving the three Respondents and the six Charging Party Unions that separately represent bargaining units of the Respondents' employees. On June 19, 1997, Administrative Law Judge Thomas R. Wilks issued the attached decision. The judge found that Respondent Detroit Newspapers (DNA) violated Section 8(a)(5) by failing to adhere to an agreement with the six Unions, collectively known as the Metropolitan Council of Newspaper Unions (the Council), to bargain jointly about certain issues subsequent to the completion of bilateral single-unit negotiations. He found that Respondent DNA did not violate Section 8(a)(5) by unilaterally implementing a work assignment proposal after reaching a bargaining impasse in negotiations with Detroit Typographical Union No. 18 (Local 18). The judge further found that Respondent Detroit News (the News) violated Section 8(a)(5) during negotiations with Newspaper Guild of Detroit, Local 22 (the Guild), by unilaterally implementing its proposals for merit pay and the assignment of unit personnel for television appearances and by failing to provide certain information requested by the Guild concerning the News' merit pay and overtime exemption bargaining proposals.

¹ We change the caption from "Detroit Newspapers, f/k/a Detroit Newspapers Agency," pursuant to the posthearing contentions of the Respondents and the General Counsel in Cases 7-CA-39522 and 7-CA-39595 (326 NLRB No. 65 (1998)), issued the same day as this decision.

The judge found that the aforementioned unfair labor practices were a cause of the strike begun by the Unions among the Respondents' employees on July 13, 1995. Consequently, the judge found that Respondents DNA, News, and Detroit Free Press violated Section 8(a)(5) by threatening unfair labor practice strikers with permanent replacement. He also found that the three Respondents violated Section 8(a)(5) by failing to provide the Unions with certain requested information about strike replacements. He found no violation, however, for the Respondents' unilateral determination of wages and benefits for strike replacements that were different from those received by the striking employees whom they replaced.

In response to the judge's decision, the Respondents filed exceptions and a supporting brief; the General Counsel, Charging Party Unions, and the Guild filed answering briefs; and the Respondents filed a reply brief. The General Counsel and Charging Party Unions separately filed cross-exceptions and a supporting brief; the Respondents filed an answering brief; and the General Counsel and the Charging Parties filed reply briefs.

The Charging Parties also moved the Board to sever and consider separately complaint paragraphs 48, 49, and 50, arising from the charge filed in Case 7-CA-38184 and relating to the issue whether the Respondents unlawfully failed to bargain about the terms and conditions of employment for strike replacements. The Respondents filed an opposition to the motion to sever. The Charging Parties filed a reply to the opposition.

On October 17, 1997, the Board reserved this motion for further consideration and decision. Having further reviewed the matter, the Board has decided to grant the motion to sever and to address the unfair labor practice issue raised in paragraphs 48, 49, and 50 separately from all others raised in this consolidated proceeding.²

In regard to the remaining allegations, the Board has reviewed the judge's decision and the record in light of the exceptions and briefs³ and has decided to affirm the judge's rulings, findings,⁴ and conclusions,⁵ to the extent

² Chairman Gould dissents from the Board's decision to sever this issue and has in a separate opinion attached to this Decision and Order set forth his reasons for doing so.

³ On September 4, 1997, the Respondents filed a motion to recuse Chairman Gould from participating in this proceeding. By unpublished Order dated September 5, 1997, the Chairman denied the motion. His reasons for denying the motion are set forth in his separate opinion attached to this Decision and Order.

All parties filed motions requesting the Board to expedite issuance of a decision in this case. By unpublished Order dated October 17, 1997, the Board denied the Respondents' request for a specific deadline date for issuance but recognized the need for expeditious processing of the case, consistent with adequate consideration of the issues raised.

⁴ The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

consistent with this Decision, and to adopt his recommended Order, as modified and set forth in full below.

I.

Respondent DNA is the employing entity responsible for the nonnews, noneditorial publishing, and circulation operations of both Respondent News and Respondent Free Press. Each of the six Charging Party Unions in the Metropolitan Council of Newspaper Unions (the Council) represents separate bargaining units of Respondent DNA's employees. Six other unions, not directly involved in this proceeding, represent separate units of skilled trades employees. There are separate collective-bargaining agreements for each unit.

During contract negotiations in 1992, DNA initially rejected a Council proposal to engage in joint bargaining about economic issues common to all units. In mid-April, after a breakdown in negotiations with Teamsters Local 372, DNA changed its position and agreed to a two-stage format for continued bargaining. Under the agreement, DNA first bargained bilaterally with each individual union over "noneconomic" unit issues. (Although characterized as "noneconomic," these issues include wage adjustments given by DNA as the quid pro quo for a union's concession on other matters.) After the resolution of these issues, the Council unions then bargained jointly with DNA on "economic" issues common to all units, such as across-the-board increases in compensation. Utilizing this format, the parties concluded both negotiating phases and reached new collective-bargaining agreements for all units within a week of the April 30 expiration date for the old agreements.

The individual contracts negotiated in 1992 were set to expire on April 30, 1995. Once again, DNA rejected the Council's initial requests for a two-stage bargaining procedure that would reserve for joint bargaining some issues common to all units. Consequently, bargaining on all issues commenced on the established single-employer, single-unit basis.

Negotiations progressed slowly for the Council units. The parties agreed to extend the old contracts on a day-to-day basis beyond April 30. On May 9, DNA President Frank Vega orally agreed with Albert Derey, the Council unions' chief negotiator, that the parties would engage in joint bargaining after tentative agreements had been reached on individual unit contract issues and that certain issues would be reserved for the joint bargaining stage.

A May 9 letter, from Derey to Vega confirmed the Council's willingness to engage in joint bargaining. Derey's letter stated his belief "that the above would serve to get the negotiations off the dime and headed in the right direction." A May 11 letter, from Derey to

Vega identified the 13 specific issues to be discussed in joint bargaining. The reserved issues were wage increases, COLAS, health insurance, duration of the agreement, vacation, holidays, life insurance, bereavement, adoption assistance plan, military leave, classified ad discount, 401(k) savings plan, and stock options.

Unlike the case in 1992, the two-stage bargaining agreement did not lead to a relatively quick resolution of all negotiations. As individual unit discussions dragged into June, DNA's negotiators began to press for a conclusion to individual bargaining. They warned that certain proposals would be withdrawn if negotiations continued past June 30. Some of these proposals included provisions for retroactive wage increases. Prior to June 15, no union representative protested these references to economic issues that had ostensibly been reserved for second-stage joint bargaining.

On June 12, the Council requested a letter documenting DNA's oral agreement to the two-stage bargaining format. DNA responded with a June 14 letter stating that it would "continue to deal on economic issues individually with each union . . . [h]owever, if we can finish all non-economics in sufficient time prior to June 30, we will meet jointly." In subsequent individual unit bargaining sessions, DNA's negotiators repeated references to a June 30 deadline, implied that they might not reach the joint bargaining stage, and made proposals on "reserved issues" or for complete contracts. The Unions disputed DNA's claim that these actions were consistent with the parties' oral agreement to a two-stage bargaining format.

The contracts expired on June 30. On July 7, DNA met in joint session with the Council and agreed to around-the-clock individual negotiations. If successful, the parties would then have engaged in joint economic bargaining. Individual bargaining on July 10-12, failed to produce agreement for any unit. The Unions struck on July 13.

The General Counsel has alleged that DNA violated Section 8(a)(5) by breaching the two-stage bargaining agreement. Much of this dispute centers on factual issues. In credibility resolutions, the judge discredited testimony by DNA's negotiators that they conditioned their agreement to a second, joint bargaining stage on progress in the initial, single-unit bilateral negotiation stage. Accordingly, the judge found that the agreement for a two-stage bargaining procedure was unconditional. The judge further found, again based on his credibility resolutions, that DNA breached this agreement by imposing three new conditions: (1) joint bargaining was contingent on progress in individual bargaining; (2) joint bargaining was contingent on tentative agreement in all individual bargaining by June 30; and (3) DNA could engage in individual bargaining on issues previously reserved for joint bargaining.

There remained the legal question of whether DNA's breach of an agreement to reserve certain issues for joint

⁵ There are no exceptions to the judge's conclusion that Respondent News' managing editor violated Sec. 8(a)(1) of the Act by removing Guild materials from a bulletin board reserved for Guild use and from editorial unit employees' mailboxes.

bargaining violated Section 8(a)(5) of the Act. The judge concluded that it did. He agreed with the General Counsel that *Boston Edison Co.*, 290 NLRB 549 (1988), extended the principles of *Retail Associates, Inc.*, 120 NLRB 388 (1958), to a single employer's agreement to engage in multiunion joint bargaining on one or more particular bargaining subjects.⁶ The judge found that DNA's attempt to modify or withdraw from joint bargaining during the antecedent single-unit bargaining stage was untimely and unlawful under *Retail Associates*.

DNA contends in exceptions that it did not give clear and unequivocal consent to the two-stage bargaining agreement, as defined by the judge, and that it did not breach the conditional joint bargaining agreement to which, it argues, it did commit itself. This argument turns essentially on challenges to the judge's credibility resolutions. As previously stated, we find no basis for reversing the judge's credibility findings.

DNA further suggests, however, that the principles of *Retail Associates* should not apply to the circumstances of this case. We agree with this proposition. As explained below, in our view, a refusal to carry out an ad hoc agreement to meet on a group basis to consider certain common issues, struck in midcourse of multiple single-union, single-employer negotiations, raises different concerns from those presented in the case of withdrawal from multiemployer or multiunion bargaining where the parties have unequivocally agreed in advance of bargaining that all will be bound by group rather than by individual action. We therefore conclude that, although there may be circumstances in which reneging on such an agreement could be found to constitute bad-faith bargaining, in violation of Sec. 8(a)(5), the General Counsel has failed to establish that the actions of DNA at issue here were taken in bad faith.

The rules concerning withdrawal from group bargaining which are set forth in *Retail Associates* are part of a set of bargaining ground rules which the Board initially developed in order to "further the utility of multiem-

ployer bargaining as an instrument of labor peace." *Charles D. Bonanno Linen Service v. NLRB*, 454 U.S. 404, 412 (1982). Because the utility of multiemployer bargaining would be significantly diminished if parties were free to come and go at will from the multiemployer unit, these rules require that in order to establish the multiemployer unit, there must be an unequivocal commitment by each member of the employer group to be bound by the results of group rather than individual action, the union representing their employees must have been notified of the formation of the group and the delegation of bargaining authority to it, and the union must have assented and entered into negotiations with the group's representatives. See *Bonanno Linen Service*, 454 U.S. at 419-420 (Stevens, J. concurring), citing *Weyerhaeuser Co.*, 166 NLRB 299 (1967), enf'd. 398 F.2d 770 (D.C. Cir. 1968). Conversely, in order for an employer or a union to withdraw from a multiemployer unit, the party seeking to withdraw must give unequivocal written notice of withdrawal prior to the date set by the contract for modification or the agreed-upon date to begin multiemployer negotiations. *Retail Associates*, supra at 395. Once bargaining has begun, withdrawal can be effected only by mutual consent or when "unusual circumstances" are present. *Id.* This precludes a party from withdrawing from the multiemployer unit because it is dissatisfied with the results of group bargaining or has otherwise decided midnegotiations that it is no longer to its advantage to be part of the group.

In cases decided since *Retail Associates*, the Board has applied the standards for withdrawal from multiemployer bargaining to withdrawal from multiunion bargaining arrangements. See, e.g., *Consolidated Papers, Inc.*, 220 NLRB 1281, 1282-1283 and fn. 2 (1975); *Boston Edison*, supra. However, it has done so only where—as in the multiemployer bargaining situation—the parties have unequivocally manifested an intent to be bound by the results of the group negotiation. Thus, the Board has held that, in multiunion as well as multiemployer bargaining, a party that has not made such a commitment is free to withdraw from group negotiations at any time and is not bound to any agreement reached through the group bargaining. *Plumbers Local 525*, 171 NLRB 1607, 1610 (1968); *Bonanno Linen Service*, supra at 420 (Stevens, J. concurring).

Here there is no evidence that before the commencement of the 1995 negotiations there was unequivocal agreement by all the parties to the bargaining to be bound by group action. Further, no party contends that the mutual consent to a two-stage bargaining procedure during negotiations in either 1992 or 1995 changed that fundamental situation. Since there was no agreement to an arrangement whereby the parties would be bound by the results of group negotiations, there is no reason to impose *Retail Associates*' stringent requirements for withdrawal from such an arrangement. Thus, if we are to find

⁶ In *Retail Associates*, the Board announced, pursuant to the statutory purpose of encouraging labor relations stability, that it would:

refuse to permit the withdrawal of an employer or a union from a duly established multiemployer bargaining unit, except upon adequate written notice given prior to the date set by the contract for modification, or to the agreed-upon date to begin the multiemployer negotiations. Where actual bargaining negotiations based on the existing multiemployer unit have begun, we would not permit, except on mutual consent, an abandonment of the unit upon which each side has committed itself to the other absent unusual circumstances. [120 NLRB at 395.]

In *Boston Edison*, supra, the Board applied the *Retail Associates* rule to an established joint bargaining relationship on a single bargaining subject, a pension plan common to three separately represented units of the employer's employees and negotiated apart from the general collective-bargaining agreements for those units. The Board found that one of the three union representatives timely withdrew prior to the commencement of joint bargaining on the pension plan. The respondent employer therefore violated Sec. 8(a)(5) by refusing to negotiate separately with this union.

DNA's breach of its agreement to engage in limited group bargaining to be unlawful, we must do so on the basis of considerations other than those that underlie the decisions in *Retail Associates* and *Boston Edison*.⁷

A change in relative bargaining power cannot be the alternative basis for our enforcement of the two-stage bargaining agreement. It may well be, as the judge observed, that certain individual unions faced a "loss of bargaining impact" if DNA renounced joint bargaining. The Supreme Court has clearly stated, however, that "our labor policy . . . [does not] contain a charter for the National Labor Relations Board to act at large in equalizing disparities of bargaining power between employer and union." *NLRB v. Insurance Agents' Union*, 361 U.S. 477, 490 (1960). See also *Evening News Assn.*, 154 NLRB 1494, 1497 (1965), *affd.* sub nom. *Detroit Newspaper Publishers Assn. v. NLRB*, 372 F.2d 569 (6th Cir. 1967).

Still, the Board has an obligation "to protect the process by which employers and unions may reach agreements with respect to terms and conditions of employment." *Sea Bay Manor Home for Adults*, 253 NLRB 739, 741 (1980). The Board has met this obligation by enforcing, through Section 8(a)(5), parties' agreements on ground rules for their negotiations. See, e.g., *American Protective Services*, 319 NLRB 902, 905 (1995), *enf. denied* 113 F.3d 504 (4th Cir. 1997) (agreement to submit employer's final offer to binding employee ratification vote); *Natico, Inc.*, 302 NLRB 668 (agreement to implement an incentive wage proposal for a trial period in order to enable both parties to determine whether it should be included in the collective-bargaining agreement). In each of the cited cases, however, the Board found that the party's breach of ground rules was inconsistent with the general statutory obligation to bargain in good faith.⁸

⁷ We disagree with Member Liebman's view that the circumstances of the 1989 and 1992 negotiations between the parties demonstrate an established practice of group bargaining. It is true that in both sets of negotiations, the unions bargained as a group over certain issues. But this does not establish a default practice of group bargaining. To the contrary, the fact that both the 1992 and 1995 negotiations commenced on an individual union basis indicates that the default procedure for these parties was individual union bargaining.

We note, moreover, that in the 1989 negotiations, although group bargaining did occur, one union subsequently withdrew from the group negotiations and negotiated a separate, complete contract with the DNA. It was this separately negotiated package which was then presented to the remaining unions and on which an agreement was ultimately reached, with minor modification. This history reinforces our view that there has been no unequivocal manifestation by the parties of an intent to be bound by the results of group bargaining and that ad hoc agreements by the parties to establish, as ground rules for negotiations, that bargaining over certain issues would occur on a group basis were subject to modification or repudiation, as needed, to facilitate bargaining.

⁸ Member Brame agrees with the majority that the principles articulated in *Retail Associates* have no application to the circumstances of this case. He further agrees with the general proposition, discussed above, that a party's breach of agreed-upon ground rules, without more,

"A statutory standard such as 'good faith' can have meaning only in the application to the particular facts of a particular case." *NLRB v. American National Insurance Co.*, 343 U.S. 395, 410 (1952). Consequently, the Board reviews the entire course of challenged conduct to see if it reveals a purpose to delay and frustrate bargaining. The evidence does not show such a purpose in DNA's conduct here.

DNA's agreement to resort to two-stage bargaining in 1995 did not work as it had in 1992, when the parties completed their negotiations within 3 weeks of DNA's acceptance of the two-stage process. In 1995, the negotiations bogged down in the first bargaining stage. Even accepting the judge's credibility-based determination that the agreement to reserve numerous issues for second stage joint bargaining was not expressly contingent on the overall pace of negotiations, we cannot altogether ignore the fact that a major goal of the ground rules agreement, struck during a side bar discussion among three of the principals, was, as stated in the Unions' own May 9 letter confirming the agreement, "to get the negotiations off the dime and headed in the right direction." By mid-June, DNA negotiators reasonably believed that this goal was not being met.⁹ So they then pursued alternative bargaining tactics with the same goal in mind.¹⁰

does not violate the statutory obligation to bargain in good faith. However, he does not rely on the holdings in the above-cited cases for that proposition. Member Brame took no part in the consideration of those cases, and expresses no view as to their correctness.

⁹ The lack of progress also had substantial economic ramifications for DNA. Its bargaining proposals contemplated operational changes and the elimination of about 150 jobs. DNA estimated that each additional week of negotiations meant a loss of \$150,000 in potential cost savings from its proposals. In individual bargaining sessions after June 1, DNA negotiators warned that they would begin withdrawing certain other proposals, including proposals for retroactive wage increases, if negotiations continued past June 30. DNA's imposition of time constraints on the two-stage bargaining agreement, and its attempts to bargain about reserved issues during individual bargaining sessions after June 15, were consistent with these other economics-driven bargaining actions, which the General Counsel does not challenge as unlawful, bad-faith conduct.

¹⁰ Contrary to Member Liebman's dissent, we believe that the Board best preserves the process of collective bargaining by forbearing from intervening in it in the absence of party conduct inconsistent with 8(d)'s obligation to bargain in good faith. In the absence of such behavior, the Board should properly leave the parties to their own devices and allow them to formulate their own procedures and structures to facilitate coming to an agreement. As such, we do not find that Respondent DNA's retreat from two-stage bargaining in this instance indicated bad faith. We find that Respondent DNA agreed to the temporary expedient of two-stage bargaining in order to move negotiations forward. And, when, in its view, the technique did not work, the Respondent returned to bargaining on all topics with the goal of reaching agreement.

While it is obvious that the communication between the parties deteriorated during this period, we do not find that the Respondent DNA's actions amounted to an attempt to frustrate the bargaining process and prevent the attainment of a collective-bargaining agreement. Consequently, we do not agree with Member Liebman that Respondent DNA's conduct in regard to its repudiation of two-stage bargaining constituted a refusal to bargain in good faith.

Furthermore, we should not lightly infer an irrevocable commitment to the two-stage bargaining ground rules, because such an agreement, although permissible, would have the practical effect of reserving most major economic issues for the second stage of bargaining. As the Second Circuit recognized in *NLRB v. Patent Trader, Inc.*, 415 F.2d 190, 197–198 (1969):

[P]ostponing or removing from the area of bargaining—to the very end of negotiations—most fundamental terms and conditions of employment . . . reduced the flexibility of collective bargaining, [and] narrowed the range of possible compromises” with the result of “. . . rigidly and unreasonably fragmenting the negotiations. . . .” See *Vanderbilt Products, Inc. v. NLRB*, 297 F.2d 833 (2d Cir. 1961) (Per Curiam).

In general, “[s]uccessful collective bargaining requires flexibility.” *Olin Corp.*, 248 NLRB 1137, 1141 (1980). Even when, as here, parties consent to a two-stage bargaining ground rules agreement with the aim of facilitating the completion of collective-bargaining negotiations, adherence to such an agreement may prove to have the opposite effect. Indeed, the Board and courts have repeatedly found that an employer violates Section 8(a)(5) of the Act by insisting indefinitely on the resolution of all noneconomic issues before negotiating economic issues. See *John Wanamaker Philadelphia*, 279 NLRB 1034 (1986); *South Shore Hospital*, 245 NLRB 848, 857–860 (1979), *enfd.* 630 F.2d 40 (1st Cir. 1980); *Adrian Daily Telegram*, 214 NLRB 1103, 1110–1112 (1974), *Federal-Mogul Corp.*, 212 NLRB 950 (1974), *enfd.* 524 F.2d 37 (6th Cir. 1975). In *Adrian Daily Telegram*, the Board found violations in spite of the fact that the unions involved in bargaining had initially agreed, without time limitation, to ground rules setting a noneconomic, economic order for negotiations. In *Federal-Mogul*, the union did not *expressly* agree to negotiate noneconomic issues first. However, after the employer insisted on imposing ground rules in bargaining, which ground rules included negotiating noneconomic issues first, the union engaged in noneconomic bargaining for many months before pursuing economic issues.

We do not suggest that the Unions’ insistence on adherence to the two-stage bargaining procedure was unlawful here. We cannot conclude, however, in light of the above precedent, that DNA was indefinitely precluded, absent the Unions’ consent, from attempting to negotiate, in the ongoing individual union negotiations, about the numerous major substantive bargaining issues that had at some interim point during negotiations been reserved for joint bargaining. Under the circumstances, DNA’s departure from the ground rules represented a good-faith attempt to accelerate, not delay, the bargaining process and to achieve, not frustrate, the completion of collective-bargaining agreements. We therefore find

that DNA did not violate Section 8(a)(5) of the Act by virtue of its above-described conduct.¹¹

II.

A critical issue in individual bargaining between the Respondent DNA and DTU Local 18 was the Employer’s proposal to permit the assignment to nonunit employees of certain work that unit employees had traditionally performed. After several bargaining sessions, the parties reached impasse on this issue and DNA implemented its proposal. The judge found that this action did not violate Section 8(a)(5).

There are no exceptions to the judge’s finding, in reliance on *Antelope Valley Press*, 311 NLRB 459 (1993), that that proposal, referring to “jurisdiction descriptions,” was in fact a work assignment proposal which did not alter the scope of the bargaining unit and that it therefore involved a mandatory subject of bargaining. Both the General Counsel and Charging Party Unions contend in exceptions, however, that the judge erred by failing to find that the proposal entailed a midterm modification of a longstanding memorandum of agreement and therefore could not be implemented without Local 18’s consent. We agree with the judge that DNA did not act unlawfully, but we do not rely on his reasoning.

In 1975, the News and Free Press each entered into a Memorandum of Understanding (MOA) with the DTU granting certain named printers lifetime job guarantees in exchange for ending the existing practice of reproduction or “reset” of work. DNA adopted the MOA in 1982. Section 10(a) of the MOA, entitled “Work Arrangements,” described “the work arrangements of the ITU employee involving the use of scanners and VDT terminals when such equipment is performing composing room work within the jurisdiction of the Union.” Section 11 of the MOU states that it “shall be ongoing and part of all future collective bargaining agreements and shall not be subject to amendment except by mutual consent of the parties.”

In 1991, the DNA and Local 18 agreed to modify the work arrangements provision of the MOA in order to assign certain work to “persons outside the bargaining unit.” In 1992, the parties agreed to a new contract that included a provision stating that

¹¹ Our dissenting colleague claims that our dismissal of this 8(a)(5) allegation reflects a “strict formalistic approach” which will discourage parties from developing workable stratagems for effective bargaining. We disagree. Indeed, we find the dissent’s approach would have the very effect she wishes to avoid. Thus, in our view, providing parties with the flexibility to enter into and deviate from new bargaining formats without the risk of being found to have violated their obligation to bargain in good-faith facilitates effective bargaining and encourages productive experimentation. Conversely, prohibiting the resumption of bargaining in the separate appropriate units unless the parties expressly agree to rescind the permissive, two-stage bargaining format, would only inhibit parties from adopting creative stratagems to reach agreement.

[W]hen a computer is performing composing room work, the jurisdiction of the Union includes the preparation of input and all handling of output, operation of the computer and all input and output devices, programming . . . and maintenance of all the foregoing equipment and devices.

A work assignment dispute arose during the term of this contract. In 1993, Local 18 filed grievances challenging DNA's assignment of composing room work to nonunit graphic designers as well as the assignment of the inputting of codes and commands to nonunit telemarketing employees. An arbitrator upheld the grievances. In so doing, he referred to the MOA but relied primarily on the "broadly retained jurisdiction of Bargaining Unit work in the Composing Room as set forth in the Collective Bargaining Agreements before and after the 1991 Memoranda of Understanding."

Section 1 of Respondent DNA's proposal for a 1995 successor contract stated:

Notwithstanding any other provision of the agreement, the jurisdiction descriptions set forth in the contract are non-exclusive. Employees of other departments of the Agency [i.e. the Respondent] as well as employees of the Detroit News and Detroit Free Press may perform such work as is necessary including, but not limited to in-putting of text and graphics, creation and in-putting of ad, manual or electronic makeup or alteration of add [sic] (whole or partial pages), the inputting of computer program changes and codes, and the makeup of whole or partial pages. Material received from outside concerns will also be processed.

Respondent DNA characterized this proposal as a "shared jurisdiction" proposal intended to maximize the use of computer technology. At one bargaining session, Respondent DNA's representative discussed, as an example, management's desire to have advertising salespersons use their portable computers to compose ads for instant viewing while making sales calls on advertisers. In five bargaining sessions from March 22 through May 11, Local 18 refused to bargain over this proposal on the basis that Respondent DNA was seeking to bargain about a permissive subject, i.e., modifying the ongoing MOA. On May 11, DNA declared impasse and effectively implemented its work jurisdiction proposal.

The judge rejected the claim by the General Counsel and Local 18 that Respondent DNA had unlawfully made a midterm modification of a collective-bargaining agreement, i.e., the MOA, without Local 18's consent.¹² He concluded that the MOA was not a fixed term agree-

ment because it lacked a definitive termination date. While relying on the absence of a fixed termination date, the judge also noted Respondent DNA's argument that the MOA's definition of work performed leaves the scope of Local 18's jurisdiction over composing room work to be defined by the current collective-bargaining agreement. Finally, the judge agreed with Respondent DNA that the parties had reached a valid impasse in bargaining on May 11, after the 1992-1995 contract had expired, and that Respondent DNA had lawfully implemented proposal 1.

We do not rely on the judge's finding that the MOA was not a "contract for a fixed period" within the meaning of Section 8(d). Although there is no identifiable calendar date for the agreement's termination, it is clearly not an open-ended contract. The MOA will expire when the last guaranteed job holder ceases to work for Respondent DNA. Until then, it is enforceable even in the absence of an overarching collective-bargaining agreement between the parties, and Respondent DNA cannot modify the MOA without Local 18's consent. *C & S Industries, Inc.*, 158 NLRB 454 (1966). See also *Heheman v. E. W. Scripps Co.*, 661 F.2d 1115 (6th Cir. 1981), denied rehearing en banc 668 F.2d 878 (1982), cert. denied 456 U.S. 991 (1982).¹³

We nevertheless find that Respondent DNA did not violate the Act by the postimpasse implementation of its work jurisdiction proposal. We find that the language of the MOA is not conclusive in determining the scope of work jurisdiction for composing room unit employees.¹⁴ Instead, it guarantees lifetime unit work for specific job holders and, in Section 10(a), further defines work arrangements when scanners and VDT terminals are "performing composing room work *within the jurisdiction of the Union*." By itself, this provision of the MOA does not define what that jurisdiction is.¹⁵ It does not state that the described tasks must be performed only by unit employees. It is therefore of no consequence to the resolution of the 8(a)(5) issue presented here that the MOA remained in effect when Respondent DNA implemented its work jurisdiction proposal in May 1995.

Since, as explained above, the MOA did not change the description of the composing room unit, the issue of the legality of Respondent DNA's insistence on proposal 1 depends on whether it was intended to modify the

¹² Sec. 8(d) of the Act explicitly excludes from the general obligation to bargain, "any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract."

¹³ Members Hurtgen and Brame do not join their colleagues with respect to this paragraph. Inasmuch as the Board is finding that Respondent DNA did not modify the MOA, Members Hurtgen and Brame find it unnecessary to reach the issue of whether Sec. 8(d) applies to the MOA.

¹⁴ The Supreme Court held in *NLRB v. C & C Plywood Corp.*, 385 U.S. 421 (1967), that the Board can construe a labor agreement in order to decide whether an unfair labor practice has occurred.

¹⁵ Indeed, defining "work arrangements" as a synonym for jurisdiction, would require reading the initial sentence of the "Work Arrangements" section as a tautology. In effect, it would read: Local 18's jurisdiction is work within its jurisdiction.

scope of the unit as described in the parties' overall collective-bargaining agreement. The 1992–1995 contract, in section 6, defined the Union's jurisdiction "and the appropriate unit for collective-bargaining" as including "all composing room work," and it included a list of specific job classifications. In section 45, the reach of the Union's jurisdiction when "a computer is performing composing room work" was described. As noted at the beginning of this section, there are no exceptions to the judge's finding that proposal 1 was a mandatory subject of bargaining under Board precedent,¹⁶ because, while it would give Respondent DNA authority to assign unit work to employees currently outside the unit, it did not purport to change the unit description or to preclude the Union from asserting that those to whom the work was assigned would properly be considered within the bargaining unit that it represented. There is, accordingly, no basis for a finding that Respondent DNA could not lawfully insist on this proposal. Thus, when the parties reached impasse after their contract had expired, Respondent DNA could lawfully implement its proposal. *NLRB v. Katz*, 369 U.S. 736 (1962). On this basis, we affirm the judge's dismissal of the complaint allegation.

III.

Negotiations between Respondent Detroit News and the Guild for the News editorial employee unit produced several allegations of 8(a)(5) violations. We affirm the judge's findings that the News violated Section 8(a)(5) of the Act by unilaterally implementing its proposals regarding merit pay, television assignments, and by refusing to furnish the Guild with requested information regarding its merit pay and overtime-exemption proposals.

As to the merit pay proposal, we agree with the judge that the News engaged in overall bad-faith bargaining that precluded the possibility of reaching a bargaining impasse that would justify unilateral implementation of any of its bargaining proposals. In this regard, we note that throughout the 1995 negotiations, Respondent News proposed that all wage increases be based on merit. During this bargaining, however, Respondent News failed to timely respond to union requests as to how this proposal would work. For example, Respondent News failed to timely inform the Guild that it was proposing percentage wage increases based on the "actual" versus "minimum" wages of unit employees, and refused to provide the Guild with information as to how much money it proposed putting in the merit pay pool, even though Respondent News had formulated an internal document supplying that exact computation. Indeed, throughout negotiations, Respondent News repeatedly obfuscated and withheld details about its merit pay proposal, which details were relevant and necessary to the Guild's under-

standing of the proposal and to the formulation of a bargaining response.

In addition, during bargaining, Respondent News demonstrated its bad faith by proposing bargaining on dates during the latter part of June when it knew that the Guild was unavailable and by falsely informing employees that the Guild had refused to attend another scheduled bargaining session. Respondent News also exhibited its bad faith by misrepresenting the Guild's position on its merit pay proposal to unit employees, and by providing more information on its proposal to unit employees than it provided to their bargaining representative. For these reasons, as well as those additional ones relied on by the judge, we find that Respondent News failed to engage in good-faith bargaining on merit pay, thereby precluding a good-faith impasse.

Furthermore, we agree with the judge that even if the parties had reached good-faith impasse, the unilateral implementation of this proposal, without definable objective procedures and criteria, was inherently destructive of the statutory collective-bargaining process and therefore violated Section 8(a)(5). *McClatchy Newspapers*, 321 NLRB 1386 (1996), *enfd.* 131 F.3d 1026 (D.C. Cir. 1997).¹⁷

The situation involving the Guild's information requests about the News' overtime exemption proposal is a little different, but still warrants the finding of a violation. The News proposed to exempt qualified, requesting employees from the Fair Labor Standards Act's hourly pay and overtime requirements and to substitute a fixed

¹⁷ We do not find, however, that the Respondent News demonstrated bad faith by first revealing that the existing performance appraisal would be the "primary basis" of merit pay recommendations in a March 31 memo distributed directly to the unit employees, rather than to the Guild negotiators. The News had revealed this intent in its initial bargaining proposal. We also do not rely on the judge's finding that the News' suggestion of a July 3, 1995 meeting with the Guild demonstrated bad faith because of its occurrence at "a foreseeably most inconvenient time" for the Guild negotiators. However, we agree with the judge's finding that other aspects of Respondent News' conduct in regard to the scheduling of the abortive July 3 meeting also manifested bad faith. Finally, in regard to the television news assignment proposal, the judge mistakenly suggested that Respondent News had failed to comply with the Board's remedial Order in *Detroit News*, 319 NLRB 262 (1995), which directed the News to rescind a prior unilateral implementation of the same proposal. That Order did not issue until several months after the second unilateral implementation of this proposal. Nevertheless, the fact that negotiations took place in the context of an unremedied unfair labor practice did preclude good-faith impasse.

Members Hurtgen and Brame do not agree with their colleagues that the existence of unremedied unfair labor practices during 1995 negotiations necessarily precluded a good-faith impasse. They do agree, however, that based on the negotiations themselves, no valid impasse was reached. As Members Hurtgen and Brame agree with their colleagues that the Respondent engaged in bad-faith bargaining over merit pay, and that this conduct precluded a valid impasse, they need not, and do not, reach the *McClatchy* issue.

We note that the judge mistakenly identified the testimony about a May 3 meeting as that of Donald Kummer instead of the actual witness, Guild representative, Lon Mleczo. Kummer did not testify at the hearing.

¹⁶ *Antelope Valley Press*, *supra*, 311 NLRB at 461–462; *Batavia Newspapers Corp.*, 311 NLRB 477 (1993).

salary for their services. In response to this overtime exemption proposal, the Guild requested information on June 14, July 10 and 11, and August 5, 1995, regarding which unit employees would be eligible. Its requests focused on the production of a list of employees whom the News believed would qualify for exemption if they asked for it. The News rejected the requests as "pointless and burdensome." It provided only an August 21, 1995 letter listing general employee classifications which might be eligible for the overtime exemption.

As an initial matter, we agree with the judge that the Guild was primarily seeking to determine the scope and impact of the proposal on unit employees, information that was clearly relevant to its role as their collective-bargaining representative. The News raises two defenses. First, it claims that it had no obligation to provide any information because the Guild had unlawfully characterized the overtime exemption proposal as illegal and refused to bargain about it. Second, Respondent News argues that it could not turn over the requested information because it did not possess any list and had no obligation to create one. We find no merit in either defense.

Regarding the Guild's alleged refusal to bargain, we agree with the judge that on June 14, the date of its initial request, the Guild retreated from its initial position that the overtime exemption proposal was illegal. Indeed, at the June 14 session, the Guild asked questions about the proposal, made a counteroffer, and made its first information request. Under these circumstances, we find that the Union was not refusing to bargain at the time of the information requests.

We further find that the News did not fulfill its statutory duty of providing specific information in some meaningful form in response to the Guild's requests. Respondent News does not contend that it had no information about the scope and impact of its overtime exemption proposal. We share the judge's doubts that it would have made the proposal, and bargained so ardently for it, without some informed estimation of its effects. Even if the News did not possess a list of those employees whom it believed would qualify for exemption, the Guild was entitled to whatever information Respondent News did rely on. See *Pacific Maritime Assn.*, 315 NLRB 24, 26 (1994). As it was, the Guild was being asked to agree to a proposal without even a hint from its author whether it was likely to apply to only a few unit employees or to encompass a sizable portion of the unit. Under the circumstances, the proper response by Respondent News was to "request clarification and/or comply with the request to the extent it encompasses necessary and relevant information." *Keauhou Beach Hotel*, 298 NLRB 702 (1990). For these reasons, we find that Respondent News violated Section 8(a)(5) of the Act by refusing to comply with the Guild's request for information.

IV.

We agree with the judge's finding that the Respondents' unfair labor practices were a cause of the Unions' July 13 strike and that the strike was therefore an unfair labor practice strike from its inception.¹⁸ In doing so, we find no need to rely on a per se causal relationship between the strike and any of the Respondents' unfair labor practices. We rely solely on the judge's analysis of the extensive credible record evidence regarding employee discussions, union communications (both to its membership and to the general public), and picket signs, all clearly indicating that, in reaching their decision to strike on July 13, the strikers were motivated at least in part by the prestrike unfair labor practices.¹⁹ *Walnut Creek Honda*, 316 NLRB 139, 142 (1995), *enfd.* and petition for review denied on other grounds 89 F.3d 645 (9th Cir. 1996) (statements at strike vote meetings and in prestrike communications to employer indicative of strike causation).²⁰

V.

We affirm the judge's findings that the Respondents' failure to provide the employment letters issued to and signed by each striker replacement violated Section 8(a)(5) of the Act. We agree with the judge's rejection of the Respondents' defense, under Section 10(b) of the Act, that the Unions' April 17, 1996 charge was untimely filed (after the withdrawal and dismissal of two prior timely charges) more than the 6 months after the initial September 29, 1995 failure to furnish these documents. We find no need, however, to rely on the judge's finding that the Respondents fraudulently concealed this information. Instead, we note that the Unions twice repeated their original information request within 6 months of the April 17 charge. Each of the Unions' requests for information and each of the Respondents' failure to comply with the request gives rise to a separate and distinct violation of the Act. *Public Service Electric & Gas Co.*, 323 NLRB 1182 (1997).

ORDER

It is ordered that fourth consolidated complaint paragraphs 48, 49, and 50, arising from the charge filed in Case 7-CA-38184 and relating to the issue whether the

¹⁸ Having found that the strike was an unfair labor practice from its inception, and in the absence of any contention by the Respondents that it converted to an economic strike at some later point, we find no need to pass on the judge's finding that 8(a)(1) threats to hire permanent replacements prolonged the strike.

¹⁹ We do not, of course, include in our causal analysis discussions and protests of employer actions that we have found were lawful, i.e., DNA's breach of the two-stage bargaining ground rules agreement with the Council and DNA's unilateral implementation of its work jurisdiction proposal for the composing room unit represented by Local 18.

²⁰ Although Members Hurtgen and Brame do not agree with their colleagues that the Respondents violated Sec. 8(a)(5) and (1) by failing to provide information concerning the Respondents' overtime exemption proposal, they agree that the other unfair labor practices found were a cause of the strike.

Respondents unlawfully failed to bargain about the terms and conditions of employment for strike replacements, are severed from the rest of this proceeding and reserved for separate consideration and decision by the Board.

IT IS FURTHER ORDERED that:

A. The Respondent, Detroit Newspaper Agency, d/b/a Detroit Newspapers, Detroit, Michigan, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Failing and refusing to bargain in good faith with the constituent member Unions of the Metropolitan Council of Unions as the respective exclusive bargaining representatives for the appropriate bargaining units as described in their respective collective-bargaining agreements, the most recent of which expired on April 30, 1995, by failing and refusing to timely and fully comply with the Unions' requests of October 17, 1995, and January 18, 1996, regarding striker replacement employees that was necessary and relevant to the Unions' performance of their duties as the exclusive collective-bargaining agreements for their respective bargaining units.

(b) Informing employees who were engaged in an unfair labor practice strike which started on July 13, 1996, that they had been or would be permanently replaced.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Bargain collectively by the Unions named below by timely and fully complying with the requests for information of October 17, 1995, and January 18, 1996, regarding striker replacement employees necessary and relevant for the performance of their duties as the exclusive collective-bargaining representative for their appropriate units:

Detroit Mailers Union No. 2040, International Brotherhood of Teamsters, AFL-CIO; Detroit Typographical Union No. 18, Communications Workers of America, AFL-CIO; GCIU Local Union No. 13N, Graphic Communications International Union, AFL-CIO; GCIU Local Union No. 289, Graphic Communications International Union, AFL-CIO; Newspaper Guild of Detroit, Local 22, The Newspaper Guild, AFL-CIO; Teamsters Local No. 372, International Brotherhood of Teamsters, AFL-CIO.

(b) Upon an unconditional offer to return to work, reinstate all unfair labor practice strikers to their former positions of employment, displacing, if necessary, any replacements hired since July 13, 1995.

(c) Within 14 days after service by the Region, post at its facilities, including offices, warehouses, distribution centers, and printing plants in the Metropolitan Detroit, Michigan area, copies of the attached notice marked

"Appendix A."²¹ Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 17, 1995.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

B. The Respondent, The Detroit News, Inc., Detroit, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain in good faith with Newspaper Guild of Detroit Local 22, The Newspaper Guild, AFL-CIO (the Guild) as the exclusive bargaining representative of employees in the appropriate bargaining unit by:

(1) Unilaterally, and without agreement with the Guild or bargaining to a valid impasse, implementing a merit pay plan proposal or a bargaining proposal concerning the right to assign unit employees to make television appearances without additional compensation.

(2) Failing and refusing to timely and fully comply with the Guild's oral requests of about April 25 and July 10, 1995, for certain intelligible information regarding the formula, amounts and criteria of its merit pay plan bargaining proposal; and the Guild's oral request of July 10, 1995, and written requests of July 11 and August 4, 1995, for information regarding its bargaining proposal concerning salary in lieu of overtime compensation; and the Guild's requests of October 17, 1995, and January 18, 1996, regarding striker replacement employees, all of which information is necessary and relevant to the Union's performance of its duties as the exclusive collective-bargaining representative in the following appropriate bargaining unit:

²¹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

All employees employed in the Editorial Department of the Detroit News, but excluding confidential employees, guards and supervisors as defined in the Act, and employees of Detroit News Washington, D.C. Bureau, and employees of other departments.

(b) Removing from editorial offices' bulletin boards customarily reserved for the use of the Guild, and employee mail slots previously allowed for Guild communications, literature, and notices posted or placed therein by or on behalf of the Guild.

(c) Informing employees who were engaged in an unfair labor practice strike which had commenced on July 13, 1996, that they had been or would be permanently replaced.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Bargain collectively, on request, with the Guild as the exclusive representative of the employees in the editorial bargaining unit concerning its merit pay plan proposal and all merit raises granted thereunder and its uncompensated television appearance policy proposal for unit employees, and if the Union requests, rescind all merit raises unilaterally granted thereunder and return to the status quo ante, and make whole any of those employees who may have suffered financial loss as provided in the remedy section of this decision.

(b) Timely and fully comply with the Guild's oral requests of April 25 and July 10, 1995, for certain intelligible information regarding the formula, amounts and criteria of its merit pay plan bargaining proposal; the Guild's oral requests of July 10 and written requests of July 11 and August 4, 1995, for information regarding its bargaining proposal concerning salary in lieu of overtime compensation, including a list of employees it considered to be eligible for such salary; and the Guild's requests of October 17, 1995, and January 18, 1996, regarding striker replacement employees, including striker replacement employment letters.

(c) Upon an unconditional offer to return to work, reinstate all unfair labor practice strikers to their former positions of employment, displacing, if necessary, any replacements hired since July 13, 1995.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of back-pay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facilities, including offices, warehouses, distribution centers, and printing plants in the Metropolitan Detroit, Michigan area, copies of the attached notice marked

"Appendix B."²² Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 25, 1995.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

C. The Respondent, The Detroit Free Press, Inc., Detroit, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain in good faith with Newspaper Guild of Detroit Local 22, The Newspaper Guild, AFL-CIO (the Guild) as the exclusive bargaining representative of employees in the appropriate bargaining unit by refusing to fully and timely comply with the Guild's requests of October 17, 1995, and January 18, 1996, regarding striker replacements employees, which information is necessary and relevant to the Union's performance of its duties as the exclusive collective-bargaining representative of the appropriate editorial bargaining unit.

(b) Informing employees who were engaged in an unfair labor practice strike which started on July 13, 1996, that they had been or would be permanently replaced.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Timely and fully comply with the Guild's requests of October 17, 1995, and January 18, 1996, regarding striker replacement employees, including striker replacement letters.

(b) Upon an unconditional offer to return to work, reinstate all unfair labor practice strikers to their former positions of employment, displacing, if necessary, any replacements hired since June 13, 1995.

(c) Within 14 days after service by the Region, post at its facilities, including offices, warehouses, distribution

²² See fn. 21, *supra*.

centers, and printing plants in the Metropolitan Detroit, Michigan area, copies of the attached notice marked "Appendix C."²³ Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 13, 1995.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

CHAIRMAN GOULD, opinion denying the Respondents' motion to recuse and dissenting from the order to sever.

I write separately for two reasons. First, I explain my prior denial of the Respondents' motion to recuse me from participation in this case.¹ Second, I dissent from the majority's decision to sever and reserve for future decision the issue of whether the Respondents' failure to bargain about the terms and conditions of employment for striker replacements violated Section 8(a)(5). In doing so, I set forth my view that the Board should overrule *Service Electric*, 281 NLRB 633 (1986), and related precedent, and find that the Respondents violated Section 8(a)(5) of the Act by unilaterally determining the wages and working conditions of striker replacements.

I.

The Respondents' recusal request refers to my written opinion in *Detroit Newspapers*, Cases 7-CA-39522 and 7-CA-39595 (*Detroit Newspapers II*) (326 NLRB 65 (1998)), authorizing the General Counsel to seek an injunction under Section 10(j) of the Act, and to my public statements supporting the Board's decision to seek the injunction. They assert that I have impermissibly prejudged facts relevant to the dispute in this case (*Detroit Newspapers I*) so that my assumption of an adjudicative role would create an appearance of unfairness.

I have carefully considered the Respondents' motion and the arguments, and I have concluded that my opinion

and public statements about unfair labor practice allegations involving the Respondents neither compromise my ability to decide impartially the instant case nor create an appearance of unfairness.

In support of their motion, the Respondents cite the Due Process Clause, cases decided under 28 U.S.C. § 455(a) and (b) governing the recusal of justices, judges and magistrates, and excerpts from the Model Code of Judicial Conduct for Federal Administrative Law Judges.² Section 455 and the Model Code require that judicial officials disqualify themselves in any proceeding in which they have an actual bias or in which their impartiality might reasonably be questioned. The aim of these provisions is to ensure that adjudicators not only are actually impartial, but also that they have not displayed any "appearance" of partiality which would undermine public confidence and trust. *United States v. Singer*, 575 F.Supp. 63 (D. Minn. 1983); and *Limeco, Inc. v. Division of Lime*, 571 F.Supp. 710 (D. Miss. 1983).

Under the actual bias standard, an adjudicator's public statements may form a basis for disqualification if they reveal that he has "adjudged the facts as well as the law of a particular case in advance of hearing it" and "made up his mind about important and specific factual questions and . . . [is] impervious to contrary evidence." *Steelworkers v. Marshall*, 647 F.2d 1189, 1209 (D.C. Cir. 1980), cert. denied 453 U.S. 913 (1981) (citations omitted). Under the appearance of impropriety standard, the test for determining whether a judge should be disqualified is whether "an informed, reasonable observer would doubt the judge's impartiality," not that "someone who did *not* know the circumstances . . . might perceive the possibility" that the judge would be partial. *Matter of*

² 28 U.S.C. § 455, as amended, provides in relevant part:

Sec. 455. Disqualification of justice, judge, magistrate, or referee in bankruptcy.

(a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding . . .

The Model Code of Judicial Conduct provides in relevant part:

Canon 2:

A. A judge . . . shall act at all times in a manner that promotes public confidence in the impartiality of the judiciary.

Canon 3:

B. A judge should abstain from public comment about a pending or impending proceeding in any court, and should require similar abstention on the part of court personnel subject to his direction and control. *This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court.* [Emphasis added.]

²³ See fn. 21, *supra*.

¹ As discussed *infra*, the Respondents refer to public statements and an opinion I have authored with respect to a proceeding under Sec. 10(j). I have appended copies of the opinion and statements at the end of sec. I.

National Union Fire Insurance Co., 839 F.2d 1226, 1229 (7th Cir. 1988) (emphasis in original).

In my separate opinion in *Caterpillar, Inc.*, 321 NLRB 1130, 1132–1134 (1996), I expressed agreement with the view of the Second Circuit that the “appearance of impropriety standard” which applies to the Federal judiciary does not apply in the administrative forum. See *Greenberg v. Board of Governors of the Federal Reserve*, 968 F.2d 164, 167 (2d Cir. 1992). Furthermore, I find that the parallel Model Code standard cited by the Respondents applies on its face to administrative law judges, not to agency heads in the Executive Branch. Still, I take the standards applicable to judges seriously and I am confident that my participation in this case conforms with such standards. I am likewise confident that there is no basis for my recusal here under the “actual bias” standard that is generally applicable to administrative proceedings. See *Robbins v. Ong*, 452 F.Supp. 110, 116 (S.D. Ga. 1978) (citing *Megill v. Board of Regents of State of Florida*, 541 F.2d 1073, 1079 (5th Cir. 1976)).

The factual predicate for the Respondents’ motion involves proceedings in *Detroit Newspapers II*. In that case, the General Counsel issued a complaint alleging that the Respondents violated Section 8(a)(3) and (1) of the Act by failing to reinstate employees who unconditionally offered to cease their unfair labor practice strike and to return to work. On May 23, the General Counsel recommended that the Board authorize him to petition a United States district court for temporary injunctive relief under Section 10(j) of the Act.

On June 19, Administrative Law Judge Wilks issued his decision in *Detroit Newspapers I*, which the Board reviews today. As previously discussed, Judge Wilks found, in relevant part, that the strike was an unfair labor practice strike from its inception. On July 1, the Board unanimously voted in the related case to authorize the General Counsel to seek a 10(j) injunction ordering the Respondents to reinstate unfair labor practice strikers who had made unconditional offers to return to work.

I authored an opinion providing my rationale for seeking injunctive relief. I also issued a public statement announcing the Board’s action and explaining the reason the action was taken. On August 14, I issued a second public statement concerning the refusal of a United States district court judge to grant the injunctive relief requested. My opinion and public statements referred, inter alia, to Judge Wilks’ unfair labor practice strike finding.

As an initial matter, I note that in neither my opinion or in my public statements did I purport to state my own view on the ultimate merits of this case. Rather, I referred to Judge Wilks’ decision as buttressing the view that there was reasonable cause to believe that the Respondents had committed the unfair labor practices alleged in *Detroit Newspapers II*. I stated in my opinion, for example, that “I am of the view that there is reason-

able cause to believe that a violation of the Act has been made on the basis of Judge Wilks’ findings and that these violations caused or prolonged the strike.” The Respondents nevertheless claim, on the basis of this and other similarly phrased references to Judge Wilks’ decision, that I have prejudged specific factual and legal issues in this case.³

An examination of the Board’s procedures under Section 10(j) of the Act is a useful starting point for explaining why my opinion and public comments fell squarely within my official role as an adjudicator and interpreter of the statute, and neither demonstrate actual bias or create an appearance of impropriety. Section 10(j) of the Act authorizes the Board, upon issuance of a complaint by the Board’s General Counsel, to “petition any district court of the United States . . . for appropriate temporary relief or restraining order.” Board authorization is a precondition to the institution of a 10(j) proceeding. The courts have generally required a showing that there is reasonable cause to believe that the Act has been violated before granting injunctive relief. *Fuchs v. Hood Industries*, 590 F.2d 395 (1st Cir. 1979); *Levine v. C & W Mining Co.*, 610 F.2d 432 (6th Cir. 1979); and *Biore v. Teamsters Locals (Pilot Motor Freight Carriers, Inc.)*, 479 F.2d 778, 787 (5th Cir. 1973). Hence, although Section 10(j) does not expressly establish a “reasonable cause” standard, one of the factors which the Board must consider in deciding whether to authorize the General Counsel to seek 10(j) relief is whether there is reasonable cause to believe that the respondent has violated the Act.

There is understandably an inherent disquietude whenever a Board member adjudicates a case involving a respondent against whom he has earlier authorized 10(j) proceedings. However, the statutory scheme under which the Board finds reasonable cause for seeking an injunction against a respondent and subsequently adjudicates the underlying case involving that respondent has repeatedly been upheld by the courts. See *NLRB v. Sanford Home for Adults*, 669 F.2d 35, 37 (2d Cir. 1981); *Eisenberg ex rel NLRB v. Holland Rantos Co.*, 583 F.2d 100, 104 fn. 8 (3d Cir. 1978); and *Kessel Food Markets, Inc. v. NLRB*, 868 F.2d 881, 888 (6th Cir. 1989), cert. denied 493 U.S. 820 (1989).

The Supreme Court addressed generally the risk of bias or prejudgment in this sequence of functions in *Withrow v. Larkin*, 421 U.S. 35 (1975). The Court held that a state board’s determination resulting from a nonadversary investigation that there was “probable cause to believe” that a violation of state law had occurred did not establish “prejudice and prejudgment” which would disable the board from hearing and deciding the same issues in a later adversary hearing, even

³ I note that the Respondents do not complain of my implicit reliance on Judge Wilks’ decision in voting not to authorize the General Counsel to seek 10(j) relief on the grounds of an 8(a)(5) allegation that the judge dismissed.

though the board would necessarily consider evidence to which it had been exposed in the earlier proceeding. *Id.* at 55–56. The Court’s reasoning is dispositive of many of the arguments raised in the Respondents’ brief in support of its motion and is well worth repeating here:

Judges repeatedly issue arrest warrants on the basis that there is probable cause to believe that a crime has been committed and that the person named in the warrant has committed it. Judges also preside at preliminary hearings where they must decide whether the evidence is sufficient to hold a defendant for trial. Neither of these pretrial involvements has been thought to raise any constitutional barrier against the judge’s presiding over the criminal trial and, if the trial is without jury, against making the necessary determination of guilt or innocence. Nor has it been thought that a judge is disqualified from presiding over injunction proceedings because he has initially assessed the facts in issuing or denying a temporary restraining order or a preliminary injunction. It is also very typical for members of administrative agencies to receive the results of investigations, to approve the filing of charges or formal complaints instituting enforcement proceedings, and then to participate in the ensuing hearings. . . . We should also remember that it is not contrary to due process to allow judges and administrators who have had their initial decisions reversed on appeal to confront and decide the same questions a second time around. . . .

The risk of bias or prejudgment in this sequence of functions has not been considered to be intolerably high or to raise a sufficiently great possibility that the adjudicators would be so psychologically wedded to their complaints that they would consciously or unconsciously avoid the appearance of having erred or changed position. Indeed, just as there is no logical inconsistency between a finding of probable cause and an acquittal in a criminal proceeding, there is no incompatibility between the agency filing a complaint based on probable cause and a subsequent decision, when all the evidence is in, that there has been no violation of the statute. *Id.* at 56–58.

These precedents rest on the well-established presumption that decisional officials are persons of honesty and integrity, capable of overcoming their prior inclinations, knowledge, and conclusions which result from prior judicial contact. *Withrow*, *supra* at 53–54; *Panozzo v. Rhoads*, 905 F.2d 135, 140 (7th Cir. 1990). The presumption of objectivity which applies to decisional officials acting in their official capacity may be rebutted upon a showing of deep-seated favoritism or antagonism that would make fair judgment impossible. *Liteky v. United States*, 510 U.S. 540, 555 (1994). The Respondents have not made such an allegation in this case. The Respondents are merely the subject of a determination by

the Board to seek injunctive relief under Section 10(j), which the courts have repeatedly held does not create an impermissible risk of bias or prejudgment.

Attempting to distinguish this case, the Respondents seize upon the fact that Judge Wilks’ decision did not concern the precise complaint allegations on which the General Counsel was seeking injunctive relief in *Detroit Newspapers II*, but involved related allegations contained in the prior complaint in *Detroit Newspapers I*. Reference to Judge Wilks’ decision and the facts underlying the decision could not logically be avoided, however, because they provide the factual and legal underpinnings of the General Counsel’s allegation that the Respondents unlawfully refused to reinstate unfair labor practice strikers. Simply put, the Board could not determine whether there was reasonable cause to believe that the Respondents had unlawfully refused to reinstate strikers without first determining that there was reasonable cause to believe that the Respondents had committed the unfair labor practices found by Judge Wilks which, if committed, converted the strike into an unfair labor practice strike. Accordingly, my knowledge regarding the facts of this case and the opinions it produced were properly acquired while acting in my official capacity of determining whether to authorize 10(j) proceedings and were necessary to the completion of that task.

The Respondents also appear to be arguing broadly that the issuance of any public statement by a Board member explaining the Board’s decision to seek 10(j) relief creates an appearance of unfairness and that members should abstain from commenting publicly about the Board’s 10(j) proceedings. The Respondents note the absence of a specific requirement in Section 10(j) of the Act or in the Board’s Rules and Regulations calling for the issuance of a formal opinion, and the absence of any precedent in the Board’s history for the issuance of an opinion or public statement in these circumstances. In my view, the silence which the Respondents’ would impose on the Board concerning its decisions to authorize 10(j) proceedings is not mandated by the “actual bias” or the “appearance of impropriety” standards alluded to above. As a general matter, agency members are free to inform the public of agency activities and policies. See *American Medical Associates v. F.T.C.*, 638 F.2d 443, 449 (2d Cir. 1980), *affd.* 455 U.S. 676 (1982). Thus, the Board and Regional Offices routinely issue press releases which report the status of Board proceedings under Section 10(j). Moreover, the Sixth Circuit rejected a similar argument in *NLRB v. Richard W. Kaase Co.*, 346 F.2d 24 (6th Cir. 1965). In *Kaase Co.*, the then-Chairman of the Board Frank W. McCulloch delivered a speech in which he explained the Board’s policies on seeking interim injunctions under Section 10(j). In the course of his explanation, he referred to the Kaase Company’s situation as one where “the violation seemed clear and the damage irreparable.” *Id.* at 28. Kaase moved to dismiss the

Board's petition for enforcement of its final order. The court denied the motion, stating that:

Whether it was politic for [the then] Chairman McCulloch to have referred to the Kaase matter is not our concern. Quite obviously, the Board under advice of its General Counsel was of an initial impression that a violation had occurred. Otherwise, an injunction would not have been sought. Such impression, however, did not foreclose impartial consideration of the matter upon a full hearing. A judge who is sufficiently impressed with a plaintiff's case to issue a preliminary injunction is not thereby disqualified from presiding at a trial on the merits.

Id. See also *FTC v. Cinderella Career & Finishing Schools*, 404 F.2d 1308, 1314 (D.C. Cir. 1968) (no impermissible prejudgment where Federal Trade Commission issued a press release stating that it had "reason to believe" that there had been violations). The holding in *Kasse Co.* easily extends to my comments concerning this case, which—to the extent that they could be viewed as at all prejudgmental notwithstanding all of the above—were much less suggestive of prejudgment on the merits.

Finally, I wish to explain once again my purpose in commenting on the Board's decision to seek an injunction. As a general matter, and certainly in a case with high visibility, it is useful for the public to know more about what we do and, more importantly, why we do it. In my view, public explanation of the Board's processes will enhance its reputation for fairness and impartiality in the long run. On the other hand, replacing the veil of mysticism and obscurantism over the Agency's processes would raise far more serious concerns about unfairness than any such characterization of my statements which were aimed at informing the public. In fact, in *McLeod v. General Electric Co.*, 257 F.Supp. 690, 709 fn. 14 (S.D. N.Y. 1966), rev'd on other grounds 366 F.2d 847, 850 (2d Cir. 1966), the court, for essentially these reasons, encouraged the Board to make public the criteria by which it determines to proceed under Section 10(j).

In summary, having carefully reviewed the Respondents' motion and the arguments contained therein, I have concluded that there can be no legitimate concern on the basis of my opinion and public comments that I have prejudged factual and legal issues in this case, or in any way compromised the appearance of impartiality in the eyes of "an informed reasonable observer." I have therefore denied the Respondents' motion and participated fully in decisional review of this case.

CHAIRMAN GOULD'S OPINION AUTHORIZING THE GENERAL COUNSEL TO SEEK A SECTION 10(J) INJUNCTION

CHAIRMAN GOULD, partially authorizing the General Counsel's recommendation:

INTRODUCTION

I am not aware of any precedent for the issuance of a written opinion by a Board Member providing a rationale for a Member's vote in cases involving Section 10(j). And, most certainly, in the overwhelming number of cases this could not be done because of the sheer volume of work and the need for prompt decisionmaking. However, in the instant case, I am of the view that it is important to set forth my rationale because of the high national and international visibility given to this case. As a general matter, and certainly in the circumstances of this case, the public needs to know more about what we do and, even more important, why we do it. That is why I write this opinion which sets forth my rationale.

This case is before the Board by virtue of a recommendation made on May 23, 1997, by the General Counsel at the request of five unions that so-called 10(j) proceedings be instituted against The Detroit Newspapers, f/k/a Detroit Newspaper Agency, The Detroit News, Inc. and the Detroit Free Press, Inc. (hereinafter to be referred to as the Employers) to obtain interim relief for violations of the National Labor Relations Act in refusing to reinstate unfair labor practice strikers who have made unconditional offers to return to work and have not been discharged for strike misconduct.¹ The General Counsel, the Employers, the Union, and counsel for replacement workers presented position statements on the propriety of Section 10(j). New procedures instituted in early 1994 by our Board make it possible for all Board Members to have access to position papers filed by *all* parties. I requested those position papers and, on May 30, 1997, they were provided. Although I do not touch upon all contentions raised by all parties, I have reviewed the documents in their entirety.

Oral Argument was requested by the Employers, but a unanimous Board has this day denied this request.

More than 100 unfair labor practice charges have been filed by and against the parties to this dispute with multiple allegations. Indeed, on March 14, 1997,² the Board

¹ "Where a strike is caused in part by an employer's unfair labor practices, the employees are entitled to reinstatement." W. Gould, *A Primer On American Labor Law*, p. 98, MIT Press, (3d edit. 1993). See *NLRB v. International Van Lines*, 409 U.S. 48 (1972). The Board has long held that an employer's unfair labor practices during an economic strike do not ipso facto convert it into an unfair practice strike. *C-Line Express*, 292 NLRB 638 (1989), enf. denied on other grounds 873 F.2d 1150 (8th Cir. 1989). Rather the General Counsel must prove that the unlawful conduct was a factor (not necessarily the sole or predominant one) that caused or prolonged the work stoppage, and, in determining this causal nexus, the General Counsel may rely upon both subjective and objective factors. *Chicago Beef Co.*, 298 NLRB 1039 (1990), enf'd. 944 F.2d 905 (6th Cir. 1991). As noted *infra*, the administrative law judge's decision, coupled with the position papers presented, provide a basis for concluding that there is an adequate nexus between the conduct found by the judge and the strike.

² *Teamsters Local 372 (Detroit Newspapers)*, 323 NLRB 278 (1997).

On June 27, 1997, in *Teamsters Local 372 (Detroit Newspapers)*, Cases 7-CC-1667 and 7-CC-1670, the Board disapproved another

cause it takes an appreciable period of time from issuance of a complaint until an administrative law judge's ruling.¹⁷ However, in this case, the administrative law judge has ruled, and the relevance of this is that the existence of such a decision serves as an important adjunct to our reasonable cause determination. The findings, based upon the record before the administrative law judge, as well as his assessment of the demeanor of the witnesses and his conclusions of law, are our starting point.

I am of the view that there is reasonable cause to believe that a violation of the Act has been made out in connection with all of the refusal to bargain areas where the administrative law judge has found violations and that the violations caused or prolonged the strike. Specifically, I do not vote to authorize the General Counsel to seek injunctive relief on the grounds, cited by the General Counsel but dismissed by the administrative law judge, that on May 11, 1995, the Detroit Newspaper Agency unilaterally implemented a bargaining proposal modifying the scope of the bargaining unit and modifying the "Memorandum of Agreement" dated June 17, 1975. Nor do I authorize the General Counsel to proceed on the theory that the Employers were obliged to bargain with the Unions about the terms and conditions of strike replacements. Though I am of the view that existing Board precedent¹⁸ is inconsistent with the principles of the Act, e.g., *Chicago Tribune Co.*, 318 NLRB 920, 928 fn. 30 (1995), I do not believe that the reversal of precedent should be undertaken through 10(j) litigation.¹⁹

Accordingly, I believe that there is reasonable cause to believe that violations of the statute have been made out and this view is buttressed substantially by the administrative law judge's decision. I am of the view that the relief sought, i.e., reinstatement of the strikers who have offered unconditionally to return to work and have not been discharged for strike misconduct, under Section 10(j) is thus just and proper under the circumstances of

the instant case and therefore should be granted by a district court.²⁰

The administrative law judge found on June 19, the issue of the right of strikers to return to work and their ability to displace replacement workers has "become a major impediment in negotiations."²¹ In my view, the collective-bargaining process cannot proceed effectively in the weeks and months to come unless prompt relief is granted on the reinstatement issue. This appears to be an appropriate part of 10(j) relief inasmuch as through such relief, the Board attempts to promote the collective-bargaining process which has thus far been burdened by what the administrative law judge found to be unfair labor practices—and what I find here to be reasonable cause to believe are unfair labor practices. It is to be recalled that 2 years ago in the baseball dispute, injunctive relief produced both industrial peace and the revival of the collective-bargaining process which culminated in the negotiation of a comprehensive collective-bargaining agreement.

An equally appropriate part of 10(j) relief is the avoidance of the delay caused by lengthy litigation before the Board and in enforcing the Board's Order. Although the median number of days from issuance of an administrative law judge's decision to the issuance of the Board's decision has continued to decrease during these past 3 years,²² the average time remains approximately 7 months. When viewed together with the length of the hearing transcript, approximately 3000 pages, more than five times the length of an average transcript, the likely delay before relief is granted is considerable, even putting aside the time required to gain enforcement of the Board's Order in the circuit court of appeals. The enforcement proceedings are likely to add significantly to the period required for the resolution of the issues here. In those cases where the propriety of the Board's Order has been challenged in court, the median number of days from issuance of the Board's decision to the court of appeals' order is 474. Thus, I would also find that 10(j) relief is just and proper to avoid the harm which is likely

¹⁷ Ordinarily, the Board would not delay authorizing 10(j) relief while awaiting the issuance of an administrative law judge's decision. In this case, the failure to reinstate occurred in February 1997. Accordingly, there has been no undue delay, and the Board has the advantage of considering the judge's findings and conclusions without the risk that undue delay might undermine the propriety of injunctive relief.

¹⁸ See, e.g., *Leveld Wholesale, Inc.*, 218 NLRB 1344 (1975); *Service Electric Co.*, 281 NLRB 633 (1986); and *Goldsmith Motors Corp.*, 310 NLRB 1279 (1993). Reversal of this line of authority is more consistent with the holding of the U.S. Supreme Court in *Curtin Matheson Scientific v. NLRB*, 494 U.S. 775 (1990), in which the Court said that the Board's refusal to presume strike replacement opposition to the union was not "irreconcilable" with these holdings.

¹⁹ Of course, novel points of law—as distinguished from reversal of precedent—are appropriate for 10(j) proceedings. See fn. 8, *supra*. While the General Counsel has distinguished the instant case from existing precedent by virtue of the strike's unfair labor practice context, my judgment is that this issue should be resolved only after briefs are filed with the Board in a full fledged 10(c) proceeding, rather than by the federal district court in the 10(j) aspect of this litigation.

²⁰ I have not always agreed with the General Counsel's recommendations to seek 10(j) relief, and, during my tenure at the Board, I have voted against authorizing injunctive relief in 17 cases. I have always assumed—and do so again in this opinion and authorization—that the same standards applicable to federal district courts under Sec. 10(j) apply to the Board at the authorization stage.

²¹ *Detroit Newspapers*, *supra* at 104.

²² In 1994, the median number of days from issuance of the administrative law judge's decision to issuance of the Board's decision was 241. By 1997, the median number of days had decreased to 210. The reduction in time is due, at least in part, to several initiatives, namely the "Speed Team" case handling process, the "Super Panel" system, and the increased use of bench decisions, implemented by the Board to expedite the resolution of certain cases. For a more detailed description of these initiatives, see *Three-Year Report by William B. Gould IV, Chairman, National Labor Relations Board*, Bureau of National Affairs Daily Labor Report, No. 45, at A1; text at E1-E14, March 7, 1997; 48 Lab. L.J. 171 (April 1997).

baseball seasons of 1995 and 1996, revived collective bargaining, and led to the negotiation of a comprehensive collective bargaining agreement late last year.

The National Labor Relations Act contains great strengths, notwithstanding its deficiencies. In the final analysis, its ability to function effectively lies in its enforcement mechanism under Section 10(j). It is this provision which we have invoked today—and the purpose of my vote is to substitute dialogue for strife, to induce the parties to reason with one another, and to foster the practice and procedure of collective bargaining within the parameters of the law.

This approach, which lies at the heart of our law, is what I have opted for today. It seeks to prod all parties to resolve their differences through their own autonomous system which has served our Nation so well. Today I urge the parties to use their procedures to the best of their abilities.

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NATIONAL LABOR RELATIONS BOARD

WASHINGTON, D.C. 20570

FOR IMMEDIATE RELEASE
Thursday, August 14, 1997

(R-2247)
202/273-1991

STATEMENT BY WILLIAM B. GOULD, CHAIRMAN, NATIONAL LABOR RELATIONS BOARD, ON COURT DENYING 10(J) INJUNCTIONS IN DETROIT NEWSPAPERS CASE

The federal district court judge has issued his ruling on the Detroit Newspapers injunction case today. Of course, I am respectful of the judicial process. Nonetheless, I regret this decision because it appears to proceed upon erroneous assumptions about fact and law. Fact, because the administrative law judge concluded that the reinstatement issue impeded bargaining progress on the basis of evidence presented to him. In most instances, there has been no hearing, let alone an administrative law judge decision, prior to the commencement or completion of a 10(j) proceeding. The existence here of a hearing and conclusions by an administrative law judge buttressed the evidence presented by the Board.

On the law, the judge states that the reinstatement question cannot be resolved until there has been a “final” affirmative answer on the unfair labor strike issue. With all respect, this conclusion is in error and, if accepted, would completely undercut Section 10(j). The striker reinstatement issue is one of liability rather than remedy.

Again, I regret today’s decision. In line with the judge’s conclusion the Board shall endeavor to “expedite” its review of this matter. But it is an understatement to say that exclusive reliance upon the administrative

process is second best and arguably ephemeral under the circumstances of this case.

###

II.

I dissent from my colleagues’ decision to sever and reserve for future decision the issue of whether the Respondents’ failure to bargain about the terms and conditions of employment for striker replacements violated Section 8(a)(5) of the Act. In my view, sufficient time has passed while this case has been pending review before the Board for a decision to be made on all issues raised by the parties. This particularly includes the significant unfair labor practice issue which my colleagues today defer to an indefinite future date. I would decide the striker replacement issue immediately, along with all other issues presented. Since my colleagues have decided not to follow this course, I have no choice but to set forth my view on the striker replacement bargaining issue in advance of their decision.

In accord with my previous statements on this issue,¹ I would overrule Board precedent, particularly including *Service Electric*, 281 NLRB 633 (1986),² and impose on the parties the same bargaining obligations for striker replacements as for any other unit employees. Accordingly, I would reverse the judge to find that the Respondents violated Section 8(a)(5) of the Act by failing to bargain before setting new terms and conditions of employment for striker replacements.

As a general rule, “an employer’s unilateral change in conditions of employment under negotiation is . . . a violation of Section 8(a)(5), for it is a circumvention of the duty to negotiate which frustrates the objectives of Section 8(a)(5) as much as does a flat refusal.” *NLRB v. Katz*, 369 U.S. 736, 743 (1962) (footnote omitted). This rule would normally include the entire collective-bargaining unit, which at any one time consists of the total number of nonstrikers, strikers, returning strikers, and striker replacements.³ In *Service Electric*, however, the Board reaffirmed an exception to the general rule by adopting a judge’s decision holding that there is no obligation to bargain concerning the terms and conditions of employment for striker replacements, and there is no obligation to rescind those terms and conditions upon conclusion of a strike.

Although Board precedent has varied considerably in addressing this issue, two primary reasons have emerged

¹ *Chicago Tribune*, 318 NLRB 920, 928 fn. 30 (1995) (Chairman Gould and former Member Browning would overrule Board precedent regarding absence of obligation to bargain).

² Contrary to one argument advanced by both the General Counsel and the Charging Parties, there is no practical or legally viable basis for defining an employer’s bargaining obligation by reference to the economic or unfair labor practice nature of a strike.

³ See *National Upholstery Co.*, 311 NLRB 1204, 1210 (1993) (bargaining unit constituents for purposes of determining doubt of majority status).

for the *Service Electric* exception. First, there is the view “that the ability to set employment terms for replacements is a *necessary incident* of the very right to hire them in the first place.” *Service Electric*, supra, 281 NLRB at 641. Second, there is a concern about “the inability of a striking representative to bargain *simultaneously in the best interests* of both strikers and their replacements.” Id. (emphasis added). I find neither reason persuasive in support of a broad, per se exception from the general obligation to bargain.

The concern for an employer’s right to replace strikers derives, of course, from the dictum in *NLRB v. Mackay Radio*, 304 U.S. 333 (1938), that:

[A]n employer, guilty of no act denounced by the statute, has [not] lost *the right to protect and continue his business* by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers upon the election of the latter to resume their employment in order to create places for them. The assurance by respondent to those who accepted employment during the strike that if they so desired their places might be permanent was not an unfair labor practice, nor was it such to reinstate only so many of the strikers as there were vacant places to be filled.

Id. at 345–346 (emphasis added).⁴

The *Mackay* doctrine itself speaks to issues of prohibited and permitted forms of discrimination between those employees who support union strike activity and those who do not support it. See also *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963). The doctrine does not directly address the issue of statutory bargaining obligations owed to the collective-bargaining representative of both groups of employees. The *Mackay*-based rationale for excusing an employer from bargaining about striker replacements’ terms and conditions of employment, however, stems from the notion that to require bargaining “would be to nullify the [employer’s] right to hire replacements.” *Times Publishing Co.*, 72 NLRB 676,

684 (1947).⁵ In other words, the Board feared that a union could obstruct or veto the hiring of replacements if it had the right to demand bargaining about the terms and conditions offered to them.

This notion is fallacious. First, the only bargaining exemption reasonably implicit from *Mackay Radio* is that an employer does not have to bargain with a collective-bargaining representative about the decision to hire striker replacements and the decision to offer employment on a permanent basis. Second, an employer does not have to bargain concerning the terms offered to replacements if it merely offers to employ them on the same terms and conditions as applied to those strikers whom they replaced. Third, if the *Service Electric* exception was merely meant to protect an employer’s *Mackay* right to hire replacements, there should be some requirement of proof that different terms and conditions of employment offered to striker replacements are necessary to attract or retain them. There is no such requirement under *Service Electric*.

Based on the foregoing, a union clearly would not possess veto power over the hiring of striker replacements even if it had the general right to demand bargaining about different terms and conditions of employment for the replacements. *Service Electric*’s exaggerated concern for an employer’s *Mackay* right imperils both the statutorily protected right to strike, and, ultimately, the stability of collective-bargaining relationships. Indeed, the failure to give sufficient weight to the statutory right to strike contravenes the Supreme Court’s recognition that “this repeated solicitude for the right to strike is predicated upon the conclusion that a strike when legitimately employed is an economic weapon which in great measure implements and supports the principles of the collective-bargaining system.” *NLRB v. Erie Resistor Corp.*, 373 U.S. at 233–234.⁶

I repeat that the *Service Electric* rule does not require an employer to prove the particular terms and conditions of employment offered to striker replacement are necessary to attract and retain a sufficient number of replacements. It also does not require an employer to reinstate prestrike terms and conditions of employment upon termination of the strike. Consequently, the exemption from bargaining under *Service Electric* goes far beyond the right to continue operations during a strike, as assured by *Mackay*, and permits an employer to secure

⁴ Although dictum in the first instance, there can be no doubt that the *Mackay* doctrine applies with the full force of law. See *Trans World Airlines v. Independent Federation of Flight Attendants*, 489 U.S. 426, 433 (1989), and cases cited there. While I disagree with *Mackay Radio*, the Board’s duty is to enforce the law as it has been defined by the United States Supreme Court. See Gould, *Agenda* at 192–193. As I have said elsewhere, “if there is to be a different result, it must come from the President and the Congress and not the Board.” *Leslie Homes, Inc.*, 316 NLRB 123, 131 (1995) (Chairman Gould concurring in the Board’s finding that the Supreme Court’s decision in *Lechmere v. NLRB*, 502 U.S. 527 (1992), creates no distinction between organizing activity and area standards activity in determining the access rights of unions to an employer’s property), and [*Teamsters Local 443 (Connecticut Limousine Service)*], 324 NLRB [633] (1997) (Chairman Gould dissenting from the Board’s conclusion that it can remand the chargeability of organizational expenses to dues *Beck* objectors consistent with *Ellis v. Railway Clerks*, 466 U.S. 435 (1984)).

⁵ In *Service Electric*, 281 NLRB 633, 637–641 (1986), the administrative law judge correctly held, despite several instances where the Board had meandered, that the Board had never expressly overruled its decision in *Times Publishing Co.*, 72 NLRB 676, 684 (1947), that employers were not obligated to bargain over replacements’ working conditions.

⁶ As I have stated elsewhere, “the idea . . . is that resort to economic strife and the presupposed infliction of pain—and especially the threat of such conduct—will induce parties to reassess their positions and to compromise.” W.B. Gould IV, *Agenda for Reform* 184 (MIT Press 1993).

The second reason for the *Service Electric* exception posits the existence of an insurmountable conflict of interest when a union must bargain simultaneously about both strikers and replacements. The “conflict of interest” terminology is misleading. It does not mean that a collective-bargaining representative is prohibited from representing both groups. On the contrary, a collective-bargaining representative has a statutory duty to represent all employees in a bargaining unit, including non-members and those who disagree with any or all of the union’s actions. When fulfilling this duty in contract negotiations, a union’s proposals will often conflict with the interests of some part of the represented unit. There is nothing inherently insurmountable about this.

Service Electric, however, presumes that there is a such a chasm of interests between strikers and their replacements that no collective-bargaining representative can bridge it in bargaining about the terms and conditions of employment for the latter. Central to this presumption is the belief that:

Strike replacements can reasonably foresee that, if the union is successful, the strikers will return to work and the strike replacements will be out of a job. It is understandable that unions do not look with favor on persons who cross their picket lines and perform the work of strikers.¹²

The Board has apparently presumed both that unions will inevitably seek to oust replacements and return former strikers at the end of a work stoppage, and that replacements know this and will oppose their union representatives because of it. Accepting for a brief moment the validity of both presumptions, the ultimate focus in the conflict of interests would seem to be on job retention. *Service Electric*, however, does not remove this issue from the bargaining table on the premise that the union cannot or should not negotiate for both strikers and replacements. Strike settlement negotiations are an important feature of the collective-bargaining process, *Retail Clerks v. Lion Dry Goods, Inc.*, 369 U.S. 17 (1962),

and unions engaged in such negotiations may legitimately demand reinstatement of strikers in preference to replacements. *Portland Stereotypers’ Union* 48, 137 NLRB 782 (1962). See also *Bio Science Laboratories*, 209 NLRB 796 (1974). Cf. *Belknap v. Hale*, 463 U.S. 491 (1983); *Hansen Bros. Enterprises*, 279 NLRB 741 (1986), enfd. mem. 812 F.2d 1443 (D.C. Cir. 1987), cert. denied 484 U.S. 845 (1987); *Target Rock Corp.*, 324 NLRB [373] (1997). Instead, *Service Electric* removed from the scope of bargaining almost everything relevant to the terms and conditions of employment for replacements *except* the ultimate divisive issue of their job retention.

At this point, it is worthwhile asking whose interests the Board means to protect under *Service Electric*. If it means to save a collective-bargaining representative from itself, by precluding the possibility of disserving replacements in negotiations with an employer, how then can it permit negotiation over the job retention issue? If the Board means to protect the replacements’ interests, how does it do so by subjecting virtually all of their terms and conditions of employment to the unilateral action of an employer rather than to a bargaining process where a union must meet its statutory duty to represent them fairly, even if it dislikes them and legitimately seeks their removal at the end of the strike?

Returning now to the dual presumptions underlying the conflict of interests rationale for the *Service Electric* exception from bargaining, I find no sufficient basis for either. In assessing evidence of continuing majority support for a collective-bargaining representative, the Board itself now holds that it will not presume replacements’ union sentiments. *Station KKH*, 284 NLRB 1339 (1987). In *NLRB v. Curtin-Matheson*, 494 U.S. 775 (1990), the Supreme Court upheld the no-presumption rule but struggled to reconcile it with *Service Electric*. It noted that:

[U]nions do not inevitably demand displacement of all strike replacements. . . . [A] union’s demands will inevitably turn on the strength of the union’s hand in negotiations. A union with little bargaining leverage is unlikely to press the employer—at least not very forcefully or for very long—to discharge the replacements and reinstate all the strikers. Cognizant of the union’s weak position, many if not all of the replacements justifiably may not fear that they will lose their jobs at the end of the strike. They may still want that union’s representation after the strike, though, despite the union’s lack of bargaining strength during the strike, because of the union’s role in processing grievances, monitoring the employer’s actions, and performing other nonstrike roles. Because the circumstances of each strike and the leverage of each union will vary greatly, it was not irrational for the Board to reject the antiunion presumption

tal regulations of wages, hours, and working conditions); *IAM v. Transportes Aereos Mercantiles*, 924 F.2d 1005, 1009–010 (11th Cir. 1991) (“Our interpretation of the [RLA’s] duty to bargain in good faith is also supported by an analogy to cases interpreting the [NLRA]”). See B. Meltzer, “The Chicago North Western Case: Judicial Workmanship and Collective Bargaining,” 1960 *Sup. Ct. Rev.* 113, 126 fn. 58 (“Despite . . . differences, the problem of delineating the duty to bargain, under the RLA, is in its broad outline substantially similar to the corresponding problem under the NLRA.”) Furthermore, the Board itself has discussed the duty to bargain under the RLA in construing what subjects are mandatory under Section 8(d) of the Act. *Johnson-Bateman Co.*, 295 NLRB 180, 184 fn. 21 (1989) (drug and alcohol testing); *Otis Elevator Co.*, 269 NLRB 891, 893 fn. 5 (1984) (decisions affecting scope and direction of business), overruled in *Dubuque Packing Co.*, 303 NLRB 386 (1991). Of course, my view is that both *Otis Elevator* and *Dubuque Packing* were incorrectly decided. *Q-1 Motor Express, Inc.*, 323 NLRB [767] (1997) (Chairman Gould concurring).

¹² *Leveld Wholesale, Inc.*, 218 NLRB 1344, 1350 (1975).

and adopt a case-by-case approach in determining replacements' union sentiments.

Moreover, even if the interests of strikers and replacements conflict during the strike, those interests may converge after the strike, once job rights have been resolved. Thus while the strike continues, a replacement worker whose job appears relatively secure might well want the union to continue to represent the unit regardless of the union's bargaining posture during the strike. Surely replacement workers are capable of looking past the strike in considering whether or not they desire representation by the union.¹³

Although the Supreme Court found that the no-presumption rule was "not irreconcilable" with *Service Electric*, the foregoing analysis completely undermines the conflict of interests rationale for a broad, per se exclusion of replacements' terms and conditions of employment from the general statutory duty to bargain. The Supreme Court did not even exhaust the list of strike and poststrike variables that weigh against any presumption of an insurmountable conflict of interests. Most notable is the fact that in many strike situations, including unfair labor practice strikes, all former strikers do not seek to return to their jobs. Even when they do, each former striker's return does not require or inevitably result in a replacement's departure. Not only might the prospect of continued poststrike employment temper the attitudes of replacements towards union representation, as the Supreme Court observed, but it might also temper the attitudes and bargaining posture of union representatives toward them. Those representatives can reasonably foresee that their continued majority support may depend on advancing the interests of replacements in bargaining about their wages and benefits.

Service Electric, however, prevents a union from proving its value to the replacements by bargaining on their behalf. By precluding, rather than permitting, bargaining about striker replacements' terms and conditions of employment, *Service Electric* actually exacerbates any conflict of interest confronting a collective-bargaining representative. It artificially bifurcates the unit, facilitates the establishment of a two-tiered system of wages and benefits, and undermines a union's ability to serve as statutory representative for all unit employees.

In sum, I find that *Service Electric* rests unsteadily on an unwarranted extension of the *Mackay* doctrine and on inapposite, discredited presumptions about the sympathies of striker replacements and the ability of a union to represent them. In my view, the Board, when it does address this issue, should overrule *Service Electric* and hew to its statutory mandate to encourage "the practice and procedure of collective bargaining." Service to this

mandate is best paid by requiring bargaining on as many issues arising from the collective-bargaining relationship as possible, not by creating broad exceptions to the bargaining obligation.

My view does not ignore the likelihood that certain strike exigencies may necessitate immediate employer action and excuse it from bargaining in advance with the union. These exigencies may involve certain aspects of striker replacements' terms and conditions of employment. Unlike the broad *Service Electric* rule, however, I would strictly limit any strike exigency exception from bargaining to the duration of a strike and I would require case-by-case proof of the necessity for a particular change. Compare *Railway Clerks v. Florida East Coast Railway Co.*, 384 U.S. 238 (1966), discussed *infra*.

For the foregoing reasons, I would hold that struck employers have the same general obligation to bargain about the terms and conditions of employment for striker replacements as for other unit employees. Since the Respondents have not demonstrated the existence of any strike exigencies that would excuse it from the general statutory obligation to bargain here, I would find that their failure to bargain violated Section 8(a)(5) of the Act.

MEMBER HURTGEN, concurring in part.

I agree with my colleagues in the majority that the "joint bargaining" allegation should be dismissed. However, I do not agree that *Boston Edison* is irrelevant to the disposition of this issue.

In *Boston Edison*, 290 NLRB 549 (1988), as in the instant case, the appropriate units were the separate units represented respectively by the several unions. In both cases, the plan was to negotiate some subjects on this separate-unit basis, and to negotiate other subject(s) on a joint (multiunit) basis. Notwithstanding this element of joint bargaining, the Board clearly stated that this did not change the character of the separate units. As the Board explained:

Although it is well settled that the parties may voluntarily agree to bargain jointly on an other-than-unit basis for certain subject matters and to bargain on a unit basis for other matters, that agreement does not result in two separate units—a broader unit for some purposes and a narrower unit for others. Only one unit covering the same employees may exist at any given time, even if the parties agree to bargain on certain matters on a different basis. (Id. at 553).

The Board went on to hold that the units remained the separate ones. Thus, the union was privileged to withdraw from the joint bargaining, and to insist that all matters be bargained separately. It followed that the employer violated the Act by refusing to bargain on a separate unit basis. Similarly, in the instant case, the separate units remained appropriate notwithstanding the ad hoc arrangement to bargain certain matters jointly. Thus, the

¹³ *NLRB v. Curtin-Matheson*, 494 U.S. at 790–792.

trust and confidence between the parties is basic to an effective and harmonious collective-bargaining relationship.” *St. Louis Typographical Union 8, ITU*, 149 NLRB 750, 754 (1964) (concurring opinion).

Whether intentionally or not, DNA’s “approach and attitude to the negotiations” was inimical to the existence of mutual trust and confidence. Its negotiators did not seek to reach an accommodation with the Unions for a mutually satisfactory alternative. They did not propose a modification of their commitment, they decreed it, completely removing the element of bargaining. Far from hastening the negotiation of agreements, this unilateral attitude and approach could only “obstruct or inhibit the actual process of discussion” (*Katz*, *supra*, 369 U.S. at 747) and destabilize the underlying relationships. Indeed, by creating a view of the bargaining process that defied accommodation, DNA may have been trapped by its own creation.

I do not argue for a rule that would automatically declare a breach of a procedural or structural agreement *per se* unlawful. I do not seek to enmesh the Board in dictating what parties shall participate in negotiations on a particular subject of bargaining. The parties should be free to work out those arrangements voluntarily. I also do not argue for curtailing the parties’ flexibility in negotiating or the latitude allowed them to evolve their own bargaining structure. Nor am I suggesting an approach that would promote inflexibility with regard to bargaining strategies or impose ill-advised regulation of the structure and process of collective bargaining.

To the contrary, I advocate a perspective that encourages opportunities for bilateral, and not unilateral, approaches to bargaining, through which employers and unions jointly attempt, not only to set wages and working conditions, but also to design and structure their negotiations and treat substantive issues at the level most appropriate to effective solution. I have declined to follow what I perceive as my colleagues’ strict formalistic approach. Rather, I have considered whether DNA’s conduct was compatible with what I understand to be the philosophy of collective bargaining embraced by the Act. In the circumstances of this case, I conclude that DNA’s negotiators’ unilateral approach, far from achieving the desired flexibility, was more likely to defeat the bargaining process. The other unfair labor practices which my colleagues and I find today, including serious violations of the duty to bargain which we agree led to the protracted strike against the Detroit Newspapers, reinforce my conclusions. Viewed in its totality, DNA’s “conduct patently indicates an unusual reluctance to accommodate to the required bargaining relationship and is wholly inconsistent with a genuine desire to reach a mutual accommodation.” *Borg-Warner Controls*, 198 NLRB 726, 728 (1972).

MEMBERS BRAME AND HURTGEN, dissenting in part.

We do not agree that the Respondents violated Section 8(a)(5) by refusing to give the Unions information concerning the Respondents’ proposal on exemptions from overtime requirements. As our colleagues state, the Unions’ requests focused on the production of a list of employees whom the Respondents believed would be covered by this proposal. However, the Respondents denied the existence of such a list, and the General Counsel never established that such a list existed. Nor did the General Counsel issue a subpoena for such a list. The administrative law judge opined that such a list must exist. But, speculation is no substitute for evidence. And, it is clear that an employer does not have to produce that which it does not have. Accordingly, we would dismiss this allegation for failure of proof.

APPENDIX A

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail and refuse to bargain in good faith with the constituent member Unions of the Metropolitan Council of Unions named below as the respective exclusive bargaining representatives for the appropriate bargaining units as described in their respective collective-bargaining agreements, the most recent of which expired on April 30, 1995, by failing and refusing to timely and fully comply with the Unions’ requests of October 17, 1995, and January 18, 1996, regarding strike replacement employees that was necessary and relevant to the Unions’ performance of their duties as the exclusive collective-bargaining representatives for their appropriate bargaining units.

WE WILL NOT inform employees who were engaged in an unfair labor practice strike which had commenced on July 13, 1996, that they had been or would be permanently replaced.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL bargain collectively with the constituent members of the Unions of the Metropolitan Council of Unions named below as the respective exclusive bargaining representatives for their respective appropriate bargaining units timely and fully complying with the Unions’ requests of October 17, 1995, and January 18, 1996, regarding strike replacement employees that was necessary and relevant to each of the following Unions’ performance of their duties as the exclusive collective-

bargaining representatives for their appropriate bargaining units:

Detroit Mailers Union No. 2040, International Brotherhood of Teamsters, AFL-CIO; Detroit Typographical Union No. 18, Communications Workers of America, AFL-CIO; GCIU Local Union No. 13N, Graphic Communications International Union, AFL-CIO; GCIU Local Union No. 289, Graphic Communications International Union, AFL-CIO; Newspaper Guild of Detroit, Local 22, The Newspaper Guild, AFL-CIO; Teamsters Local No. 372, International Brotherhood of Teamsters, AFL-CIO.

WE WILL, upon an unconditional offer to return to work, reinstate all unfair labor practice strikers to their former positions of employment, displacing, if necessary, any replacements hired since June 13, 1995.

DETROIT NEWSPAPERS

APPENDIX B

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail and refuse to bargain in good faith with Newspaper Guild of Detroit, Local 22, The Newspaper Guild, AFL-CIO as the exclusive bargaining representative of employees in the appropriate unit by: unilaterally, and without agreement with the Guild, implementing or bargaining to a valid impasse, a merit pay plan proposal or a bargaining proposal concerning the right to assign unit employees to make television appearances without additional compensation; or by failing and refusing to timely and fully comply with the Guild's oral requests of about April 25 and July 10, 1995, for certain intelligible information regarding the formula, amounts and criteria of its merit pay plan bargaining proposal; and the Guild's oral request of July 10, 1995, and written requests of July 11 and August 4, 1995, for information regarding its bargaining proposal concerning salary in lieu of overtime compensation; and the Guild's requests of October 17, 1995, and January 18, 1996, regarding striker replacement employees, all of whom information is necessary and relevant to the Union's performance of its duties as the exclusive collective-bargaining representative in the following appropriate bargaining unit:

All employees employed in the Editorial Department of the Detroit News, but excluding confidential employees, guards and supervisors as defined in the Act, and

employees of Detroit News Washington, D.C. Bureau, and employees of other departments.

WE WILL NOT remove from editorial offices' bulletin boards customarily reserved for the use of the Guild, and employee mail slots previously allowed for Guild communications, literature and notices posted or placed therein by or on behalf of the Guild.

WE WILL NOT inform employees who were engaged in an unfair labor practice strike which had commenced on July 13, 1996, that they had been or would be permanently replaced.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in their rights guaranteed under Section 7 of the Act.

WE WILL bargain collectively, on request, with the Guild as the exclusive representative of the employees in the editorial bargaining unit concerning its merit pay plan proposal and all merit raises granted thereunder and its uncompensated television appearance policy proposal for unit employees, and if the Union requests, rescind all merit raises unilaterally granted thereunder and return to the status quo ante, and make whole any of those employees who may have suffered financial loss.

WE WILL timely and fully comply with the Guild's oral requests of April 25 and July 10, 1995, for certain intelligible information regarding the formula, amounts, and criteria of its merit pay plan bargaining proposal; the Guild's oral requests of July 10 and written requests of July 11 and August 4, 1995, for information regarding its bargaining proposal concerning salary in lieu of overtime compensation, including a list of employees it considered to be eligible for such salary; and the Guild's requests of October 17, 1995, and January 18, 1996, regarding striker replacement employees, including striker replacement employment letters.

WE WILL, upon an unconditional offer to return to work, reinstate all unfair labor practice strikers to their former positions of employment, displacing, if necessary, any replacements hired since June 13, 1995.

DETROIT NEWS, INC.

APPENDIX C

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail and refuse to bargain in good faith with Newspaper Guild of Detroit, Local 22, The Newspaper Guild, AFL-CIO as the exclusive bargaining representative of employees in the appropriate editorial bargaining unit set forth in its expired collective-bargaining

by threatening to hire and declaring that they have already hired permanent replacements for striking employees who the General Counsel alleges were engaged in an unfair labor practice protest strike which was caused and/or prolonged by the alleged unfair labor practices. The strike commenced on July 13, 1995, and continued on, at least to the time of receipt of the briefs. There have been nationally published newspaper articles which referred to an unconditional offer to return to work by the striking Unions in mid-February 1997, to the Respondents' offer to reinstate them only to positions that may come open and Respondent's refusal to terminate any replacement employees to provide such position. I have not, however, received any official communication from the parties.

B. Background

The Free Press is a daily newspaper owned by Knight-Ridder, an international information and communications company headquartered in Miami, Florida. The News is a daily newspaper owned by Gannett Co., Inc. (Gannett), a news, information, and communications company headquartered in Arlington, Virginia.

Prior to 1989, each newspaper had separate collective-bargaining agreements with the various unions representing newspaper employees in the metropolitan Detroit area. By 1986, both newspapers were losing money. In the spring of 1986, a partnership agreement was entered between the News and the Free Press to form the DNA under the Newspaper Preservation Act—a Federal legislative enactment that provides an exception to the Federal antitrust laws and permits two competing newspapers to merge all of their noneditorial functions if one of the two newspapers can demonstrate to the Attorney General of the United States that it is in the probable danger of financial failure. The Free Press applied to be designated as a newspaper in probable danger of financial failure. Hearings were held and in August 1988, the Attorney General approved the application. Implementation of the joint operating agreement (JOA) was stayed by Court order until appeals regarding the JOA were exhausted in November of 1989 and the stay was lifted.

Under the partnership agreement, the DNA was created. The DNA is governed by a five-member board of directors; three are appointed by Gannett and two by Knight-Ridder. Its president and chief executive officer is Frank Vega. Its vice president for labor relations is Timothy Kelleher.

The DNA manages all noneditorial functions for the two newspapers. Among the functions it performs are all financial, production, composing, printing, distribution, information systems, human resources, and the marketing for the News and the Free Press. Under the Newspaper Preservation Act, the editorial departments of the two newspapers must remain separate and distinct.

The DNA has four main facilities in the metropolitan Detroit area: two downtown office buildings on Lafayette Street which were originally the home offices of the News and the Free Press; a printing plant in downtown Detroit known as the Riverfront Plant, which prior to the DNA was the main printing facility for the Free Press; and a printing plant in Sterling Heights, Michigan, known as the North Plant, which prior to the DNA, was the main printing facility for the News. The DNA also has approximately 20 distribution centers or circulation warehouses in the metropolitan Detroit area.

The DNA negotiates with several crafts. It bargains with the Local 18 as the representative of composing room employees or printers; Local 289 which represents the photoengravers; Local 13N as the representative of the pressmen, paper handlers and plate makers; Local 2040 which represents mail room employees; the Guild which represents a unit of janitors; and Local 372 which represents two units—an outside unit composed mainly of drivers, district managers and related outside circulation classifications involved in the delivery of the newspapers to carriers and single copy outlets such as racks and stores, and the inside unit which is made up of the clerical employees in the circulation department who handle various circulation clerical functions and customer complaints.

In addition, the DNA bargains with the International Brotherhood of Electrical Workers (IBEW) representing electricians; the International Union of Operating Engineers (Operating Engineers) which represents employees who operate the heating, ventilation and air-conditioning equipment; the Carpenters Union representing carpenters; and the International Association of Machinists (Machinists) which represents two units—garage mechanics who repair company vehicles and machine mechanics who repair the printing presses, inserting equipment and various mechanical devices in the two printing plants. The IBEW, the Operating Engineers, the Carpenters and Machinists are collectively referred to as the “skilled trades” Unions.

The Guild separately represents the editorial employees at the News and the Free Press.

Since the creation of the DNA, John Jaske, senior vice-president of labor relations and assistant general counsel of Gannett, has served as the chief spokesman for the DNA in negotiations with the various Unions and also serves as the chief spokesman for the News in its negotiations with the Guild. Timothy Kelleher is chief spokesman for the Free Press in its negotiations with the Guild.

Under the joint operating agreement (JOA), the News and the Free Press each publish separate newspapers Monday through Friday. On weekends and holidays, the newspapers publish under a combined masthead.

C. Case 7–CA–37385—Joint Bargaining (Complaint Paragraphs 18–20)

1. Facts

a. Pre-1995 negotiations

In 1986, after the JOA was announced, the News and the Free Press entered into what were called “shadow” negotiations with the various Unions, to try to work out a framework for collective-bargaining agreements in the event the JOA was ultimately approved.

In May 1989, the News and the Free Press, functioning as a publisher's council, negotiated an interim wage increase with the newspaper Unions. In negotiating the increase, the two newspapers dealt with two groupings of Unions—one group, led by Teamsters Local 372, included Mailers Local 2040, the Machinists, the Electricians, the Carpenters, the Operating Engineers, and the Service Employees International Union which at the time represented janitorial employees at one of the newspapers. The other group included the Pressmen, Guild, Photoengravers Local 289, and DTU Local 18. A settlement of a \$22 weekly increase was reached with one group and that settlement became the basis for the agreement with the other group of Unions.

letter embodied the same issues as previously outlined and noted, as the letter stated, joint economic bargaining will commence after "a tentative overall agreement on non-economic issues." The subjects enumerated in the letter "for joint economic bargaining" are as follows:

1. wage increases
2. cost of living
3. health insurance
4. duration of the agreement
5. vacation
6. holidays
7. life insurance
8. bereavement
9. adoption assistance plan
10. military leave
11. classified ad discount
12. 401(k) savings plan
13. stock option plan for both Knight Ridder and Gannett

Thereafter, negotiations proceeded between the DNA and the individual Unions which focused upon critical issues outside the scope of the 13 reserved topics such as manning.

From May 9 to June 15 inclusive, Mailers Local 2040 had seven bargaining meetings with the DNA. During the same period of time, GCIU Local 13N had four meetings and DTU Local 18 had two meetings. Teamsters Local 372 met regularly and frequently with the DNA during this period of time, generally at least once a week. During the same period of time, there were no meetings between the DNA and Local 289. There was no extensive discussion of the reviewed issues; although on occasion the DNA meeting with Local 2040 and Local 13N explicitly referenced one or more of them, it was acknowledged by negotiator Kelleher or Jaske that such topic was to be negotiated at subsequent joint negotiations "if we get there." As to the significant individual issues perceived by the DNA to require priority resolution, there was no agreement.

In late spring 1995, the DNA concluded that because of its perceived low productivity levels at the inserting facility, it would shut down the facility and subcontract the work. Sixty days' notices of the possible closure were given to Local 372 and Local 2040 under the Worker Adjustment and Retraining Notification Act ("WARN"). On about June 1, 1995, the DNA negotiators calculated the Mailers might be enticed to move significantly on manning and productivity issues by informing Local 372 and Local 2040 that it would withdraw the WARN notice and that the contemplated closing of the inserting facility would not take place if the parties made progress in negotiations by June 30, 1995, the day the inserting facility otherwise would have closed.

Both Jaske and Vega testified that they were concerned about the lack of progress in negotiations. The DNA bargaining objective was to eliminate a total of about 150 jobs through attrition and buyouts. Since those jobs averaged \$1000 weekly each, the DNA concluded that it was incurring costs approximately of \$150,000 weekly as negotiations continued.⁷ Vega and Jaske testified that they therefore began telling union officials that proposals were going to start coming off the table if negotiations continued past June 30. Some of those proposals

included retroactive wage increase proposals made in individual contract proposals, according to Jaske's testimony, for the purpose of inducing individual contract agreement by June 30. There is no contention by the General Counsel that the DNA insisted upon negotiating reserved economic issues individually prior to mid-June 1995. Jaske's testimony is uncontradicted that no other objection was raised to these references to reserved economic subjects in the course of individual proposal exchanges prior to June 15.⁸

On June 12, at a Council of Unions meeting, one of the Council members questioned whether the Unions had received anything in writing documenting DNA's commitment to the bargaining process. Derey replied he had not received any such writing nor had he expected a writing. There had been no written memorialization of prior negotiating format agreements. At the urging of a concerned member of the Council, Derey contacted Vega, asking him to send a written confirmation of their agreement. At first, Vega indicated that he had sent such a letter, but discovered that he had not upon searching his files. Pursuant to Derey's request, Vega agreed to confirm the agreement to Derey in a letter.

On either June 14 or 15, Vega hand-delivered a letter dated June 14, 1995, to Derey by Vega, in Jaske's presence, either before or after meeting with the Union's Executive Committee on the Local 372 negotiating team in or near Vega's office, depending upon conflicting recollections of the witnesses. The letter addressed to Derey, drafted by Jaske but signed by Vega, stated:

When we spoke several weeks ago about your desire to bargain economics jointly for the unions who have not yet settled, I told you that issue would depend on progress on non-economic issues.

In view of the lack of progress in negotiations and our desire to finish negotiations by the end of the month, we will continue to deal on economic issues individually with each union. However, if we can finish all non-economics in sufficient time prior to June 30, we will meet jointly.

It is undisputed that Derey became upset and remonstrated with Vega. Derey accused Vega of renegeing on their joint bargaining agreement. Vega, who was not rebutted, testified:

And I assured him personally that we would joint bargain once we had completed non economic issues and that I was through this letter re-emphasizing the fact that at the pace we were going we were never going to conclude non economic issues by the 30th and that would complicate negotiations past that point for the reasons I mentioned earlier.

Vega's testimony did not address itself to the apparent consequence of deadline noncompliance with any further clarification.

Derey testified that he told Vega that they had not agreed upon any conditions but that Vega insisted that they had, and that he, in turn, called Vega a liar because he had promised unconditionally to engage in the same two-stage bargaining

⁷ By delaying the contemplated reductions to June 30, 1995, the DNA estimated that it would lose over \$1.2 million in cost saving opportunities.

⁸ See, for example, Jaske's testimony regarding the June 2 DNA proposal to Local 372, sec. 24 of the supplement agreement dealing with wages which was referenced to conditional retroactivity by Jaske in negotiation; and also the DNA June 7 proposal and negotiations with Local 13N. See also the testimony of Local 13N President Howe and also Mailers Local 2040 President Alex Young regarding discussions of an early June reserved wage topic.

format as in 1992. Neither version is inconsistent nor mutually exclusive, and I credit both versions, finding Derey less vague and ambiguous.⁹

Vega testified in cross-examination that the purpose of the letter was for the DNA to achieve a contract by June 30, 1995, so that it could start staff reductions and that the letter was Jaske's idea. Jaske testified that the purpose of the June 14 letter, which had no reference to proposal withdrawals at all, was to "reinforce what we had been telling the Unions," i.e., to complete negotiations by June 30 or the DNA "would start pulling stuff off the table." Both Jaske's and Vega's testimony fails to address the conditional element of progress patently set forth in the letter. Similarly, neither their testimony nor Derey's testimony clearly addressed the reference therein to a "continuation of economic negotiation individually" as a consequence of lack of progress. That sentence is wholly ambiguous. If it refers to individual economic issues peculiar to individual bargaining, then it constitutes a meaningless non sequitur, as such was part of the agreement and not a consequence of a lack of progress. If it refers to subjects covered by the 13 reserved topics which Kelleher agreed were reserved for joint bargaining, then it refers not to extensive give-and-take negotiations but to sporadic instances where such items were almost inadvertently included in a proposal and where the parties quickly acknowledged their reserved status. It would also refer to the above testimony of Jaske regarding his retroactive wage proposals as a stimulus to individual agreement, but which undisputedly were rejected out of hand and were not the subject of serious consideration in a give-and-take bargaining scenario before mid-June. The only possible intelligible interpretation of the second two-quoted sentences is that the DNA will continue bargaining in the 1992 two-stage format but will bargain jointly "if" the June 30 deadline is affirmed.

Respondent, in its brief, apparently abandons the common definition of the word "if," i.e., "in the event," or "on condition."

Respondent argues in brief that the letter is significant for what it does not say. In its brief, the Respondent seriously suggests that the letter does not state that Respondent will only bargain jointly upon compliance with the deadline. I find such argument to be so casuistic as to constitute an intellectual affront. If such guile was in the mind of the author of that letter, I can only conclude that he deliberately calculated to cause confusion at least, and apprehension most likely, in the mind of the reader that the two-stage format would not continue failing a deadline compliance, although in the writer's mind, he could somehow later claim that he did not mean what it purports to say. If that construction urged in Respondent's brief is to be accepted, at best the letter was intentionally misleading and its authorship raises a serious question of the good faith of a negotiator who, in writing, misleads as to bargaining format compliance intent and refuses to clear it up in personal confrontations thereafter.

In any event, even under Respondent's urged interpretation as further argued in the brief, the letter places a unilateral fixed deadline upon its commitment to joint economic bargaining and creates a window whereby it may or may not at its option con-

tinue to commit itself to joint bargaining, i.e., it now views itself as having only a limited commitment.

On June 15, 1995, the DNA and DTU Local 18 engaged in a negotiation meeting. DTU spokesperson, Attorney Sam McKnight, and Jaske for the DNA reviewed the status of negotiations. The issue of joint bargaining arose. Jaske testified that McKnight made some kind of reference to the open DNA wage proposal and stated that he thought it was a matter reserved for joint bargaining. McKnight testified that he made reference to a DNA proposal to Local 18 encompassing health care insurance as a matter to be deferred to joint bargaining. McKnight's testimony of Jaske's response is as follows:

[T]he agreement to reserve specific economic items for joint bargaining was only effective if the unions reached agreement in their individual negotiations by June 30 of 1995 . . . the agreement was conditioned on the unions reaching individual negotiation conclusions by June 30 and that the company had always reserved the right to bargain with each union individually all items, both economic and non-economic.

According to McKnight, Jaske went on to assert that he had explained this to Derey several times and had confirmed it in writing and that because of the slow pace of negotiations, the DNA intended to proceed with negotiations of all items, both economic and noneconomic, with each Union. According to McKnight, he protested that it was his understanding and the Local 18 understanding that there was "an unqualified commitment between the Union and the Company to reserve a specific number of designated economic items for joint bargaining."

After a caucus consultation with Derey, McKnight returned to the bargaining table and reiterated the nonconditional commitment understanding.

According to Jaske, when McKnight first expressed his understanding of the bargaining format, he responded that the DNA was dealing individually with the Unions and was trying to resolve individual issues by June 30 or to at least make progress by June 30; and that it was at that point McKnight asked something to the effect of whether Derey understood this was how negotiations were proceeding. Jaske testified that he answered that Derey ought to understand because that has been their discussion up to now. Jaske denied having ever said that the agreement to bargain jointly on economic issues was effective only if the Unions concluded individual negotiations by June 30, nor that he ever said that joint bargaining will take place only if the parties concluded individual negotiations by June 30. According to Jaske, McKnight then asked whether the DNA was prepared to make a wage proposal or had the DNA made a wage proposal. Jaske responded that the DNA was prepared to make the same 4-percent, 3-percent, 3-percent wage progression raise as had been accepted by the five skilled trades Unions but that the DNA was at impasse with Local 18 over the issue of shared jurisdiction over unit work with the graphic designers. After some discussion over that issue according to Jaske, the parties caucused, after which the DNA offered the 4-percent, 3-percent, 3-percent, 3-year wage progression. Respondent argues in its brief that such wage offer was "... an individual proposal designed to resolve the jurisdictional issues that separated the parties and was not made in lieu of joint economic bargaining."

McKnight's version of the postcaucus discussion centered about the shared jurisdiction issue with graphic designers, after

⁹ Jaske's account is so cryptic that it does not constitute an effective contradiction of Derey. On its face, it even conflicts with Vega for, according to Jaske, the only thing Vega had said about joint bargaining was that the DNA wanted "to get this done." If there is an inconsistency between Derey and Vega, I therefore credit Derey.

which Jaske made the wage proposal retroactive to the date of the 1992 contract expiration date, conditioned upon completion of a contract by June 30. However, further discussion took place concerning whether they were at impasse over the shared jurisdiction issue, compliance with an arbitration award and compliance with the Memoranda of Agreement involved in a separate issue.

McKnight testified that although he reiterated Local 18's position regarding the two-level bargaining format, he did make an economic wage offer "under protest." He admitted in cross-examination that after Jaske asserted the DNA right to bargain individually what had been reserved for joint bargaining, he did ask Jaske if the DNA were ready to proceed and to make a wage proposal, after which Jaske did make the retroactive proposal.

Respondent argues that Jaske should be credited because minutes compiled for Local 18 by Union Secretary Art Robbins support Jaske rather than McKnight because they reflect no categorical refusal by Jaske to engage in joint bargaining if noneconomic bargaining was not resolved by June 30. Those notes (in evidence as G.C. Exh. 164, p. 1), however, tend to track the sequence of discussion according to McKnight.¹⁰ They state, in part:

McKNIGHT: Is it not correct that health insurance is joint bargaining? JASKE: We gave an end of the month deadline (June 30) for settlement of non-economic bargaining. Possible we may have some joint bargaining—increasingly unlikely will get to joint bargaining by end of the month.

McKNIGHT: Are you prepared to make a wage proposition to Local 18 at this time?

JASKE: Yes.

McKNIGHT: Does (Al) Dere [sic] know about this and does he understand this?

JASKE: He should, has been told many times (by Jaske). Only economic proposal not on table is wages for journeymen and part-timers. We are basically at impasse in these negotiations.

McKNIGHT: (Your offer) of some wage proposal for Local 18—Not willing to accept that as a proposal—Willing to compromise on jurisdiction (proposal #1)—But need a full package.

Indeed, those minutes, although clearly not purporting to be absolutely complete, do not entirely reflect the impassioned rhetoric narrated in McKnight's testimony. The great preponderance of the account deals not with the subject of joint bargaining, but with the jurisdictional issue and Respondent's implementation of its proposal No. 1 regarding the shared jurisdiction issue; and that is the issue which was the major subject of McKnight's ire according to those notes. His references to joint bargaining are much more limited until at the end, the notes reflect the following: McKnight gave DTU Modified Proposal with the comment "a few of these I thought were joint bargaining and will have to talk with (Al) Derey."

¹⁰ Upon Respondent's objection to improper authentication, counsel for General Counsel limited the sole purpose of the exhibit to reflect Vega's statements at the meeting. However, by citing the exhibit in its brief, I conclude that Respondent does not object to its receipt for the purpose of reflecting what Jaske and McKnight said regarding the joint bargaining issue.

[Summation of Local 18 proposal]

JASKE: Think about what I said. Set aside the above mentioned issues—joint bargaining could have come about if all non-economics had been resolved.

McKNIGHT: That's not accurate. Not what agreed to with regards to joint bargaining.

VEGA: If we can get the non-economic TA's done by June 30th, we can get into joint bargaining—that's what I told Derey.

JASKE: If you don't want to continue bargaining, just say so, and then we'll do what we have to do.

McKNIGHT: (*re: joint bargaining*) You've thrown in a tremendous monkey wrench—you don't just get a little bit pregnant and a month later say I'm not pregnant at all.

VEGA: Not getting the TA's (*which supposedly predicates joint bargaining*). Did not send letter (to Derey) until today because I wasn't asked to.

The notes thus suggest that at meeting's end, McKnight had not yet talked with Derey as he claimed he had during the caucus. But those notes do reflect an appearance by Vega who admitted on cross-examination that he did discuss the issue of the parties' joint bargaining. He had first testified on direct examination that he was not involved in nor did he appear at any Local 18 negotiations and, although present at the end of the June 15 meeting, he was silent and appeared only as an invited observer.

The minutes also corroborate McKnight's testimony that he objected that the DNA's statement of position regarding joint bargaining was a new disruptive development. The notes support the inference, therefore, that Jaske initially made some disconcerting statement about joint bargaining and not merely the ambiguous reference to some unspecified desire for a contract by June 30, as reflected in the above testimonial account. In fact, it must have been sufficiently provocative that Vega was constrained to make some statement about joint bargaining in an unprecedented appearance at the bargaining table. The notes are clear enough. Vega conditioned joint economic bargaining upon completion of noneconomic bargaining by June 30.

In any event, McKnight's testimonial account of Vega's full comments was neither contradicted by Vega nor Jaske. His account of Vega's comments and his response are therefore credited. His testimony is:

Vega said that he was the person who had many conversations with Al Derey, explaining that the company had already reserved the right to bargain all topics including economic topics with each of the unions individually. He said that he had made this clear to Derey in a number of conversations. He said that he had written Derey a letter to that effect. He said that the progress in negotiations with the unions individually was not satisfactory and that the company intended to go ahead and to bargain individually with each of the unions on all topics including the so-called economic topics reserved for joint bargaining.

McKnight thereupon challenged Vega's veracity and insisted to Vega that the parties had "a genuine commitment . . . to reserve common economic items for joint bargaining." McKnight asked the DNA team to reconsider and characterized their new position on joint bargaining as having the effect of throwing a "tremendous monkey wrench into the entire bargaining process between all six Unions and the Company." The

only response he received was from Jaske: "You've got our proposal."

McKnight's testimony is supported by the context of the minutes, and his account of the DNA position on joint bargaining as stated by Jaske is in accord with his uncontradicted and credited testimony of Vega's statement of the DNA position. Accordingly, I credit McKnight and discredit Jaske's denials.

On June 16, 1995, the DNA and Mailers Local 2040 Union met in negotiations. The DNA presented the Mailers Union with a proposal to reduce manning. The proposal referenced a 4-percent increase immediately, a 3-percent increase in the second year and a 3-percent increase the third year, retroactive but conditioned on contract agreement by June 30. The percentage increases were part of an offer to maintain their standard of living while reducing manning over a period of years. At the meeting, Local 2040's president, Young, testified that he referred to the percentage increases and said they were subjects for joint bargaining. Jaske responded that the DNA had agreed to joint bargaining in May but that "there was a deadline, that the deadline was a must, and that they would bargain jointly if we ever got there." Young was not contradicted. In cross-examination, he admitted that the proposals received from the DNA prior to the strike were individual to Local 2040 and that the wage proposal was made in the context of a discussion of manning and work practices, which had been discussed at every meeting and the resolution of which was a condition precedent to joint bargaining. Young admitted that at every other meeting, including one on June 30 and thereafter, when Jaske alluded to wages on a reserved issue such as COLA and when he was reminded that it was a reserved topic, Jaske or Kelleher agreed and said "if we get there."

Jaske testified as to the DNA bargaining with individual Unions. According to him, there was no change in the "fashion" of individual bargaining between May 11 to July 15. He testified that the DNA made economic proposals to expedite resolution of individual issues with Local 372, the Pressmen and the Mailers involving manning, alleged artificial overtime and work-related issues. He testified that wages were regularly referenced, and on occasion health care by the DNA, at which point the Union would remind the DNA that the issue was reserved for joint bargaining to which he or Kelleher irritably responded, "Yes, if we ever get there." The General Counsel argues that as of June 16, the DNA "changed direction."

Young testified that indeed had been the practice before June 16, as Jaske testified, but now Jaske had set a deadline. Respondent argues that Young's testimony is ambiguous because the deadline was not explained, i.e., was it a deadline for agreement conditioning joint bargaining, or was it a deadline for pulling proposals off the table, e.g., retroactive wage increases. Jaske testified that the wage proposal to the Mailers contained in a complete 3-year proposed contract was a quid pro quo for a reduction of Mailers manning costs. He testified that the deadline reference by him was not for overall agreement but only as to the specific quid pro quo proposals.

The General Counsel's next citation of a change in DNA direction is the June 16 negotiation with Local 13N which was led by President Jack Howe. The issues concerned the plate room scale committee. After a caucus, Jaske returned with a 3-year contract proposal which referenced a reserved topic. Howe objected that the topic was a reserved joint bargaining topic. He testified that Jaske stated that if a contract was not obtained by June 30 that

we would have other things to worry about, that there was no progress on non-economics, and without progress on non-economics, we'd never get to joint negotiations, and if we didn't get an agreement by June 30th that they were going to start pulling things off the table and we would end up with something other than agreements.

Upon some prodding by counsel for the General Counsel who asked if the consequences of nonagreement by June 30 were stated, Howe answered, "He said if we could be through with non-economics prior to June 30th, we may enter into joint negotiations." Howe testified that he caucused with his team, returned and responded to Jaske that he "needed to have further clarification on the joint bargaining" because he was unaware of any conditions, to which Jaske said "fine" and the meeting ended. According to Howe, Jaske did not contradict Howe's contention that the DNA was now conditioning the joint bargaining agreement.

Jaske did not explicitly contradict Howe. In cross-examination, Howe conceded that manning constituted the main issue and monopolized the discussions and that on June 7, Jaske had set June 30 deadlines on certain proposals, including union security. From Respondent's viewpoint, Jaske in effect did not set a deadline for joint bargaining but only for pending proposals and merely stated what the parties had agreed upon, i.e., that individual contracts must be agreed upon before joint bargaining would commence. Kelleher drafted longhand notes of negotiation meetings. He is described by Respondent in the record as its "historian" for the issues under litigation. His notes reflect that at the June 16 meeting, Jaske characterized Vega's letter to Howe as purporting to state:

[A]s long as we were making progress we could bargain jointly—we have not made progress & need to be settled by June 30.

If we don't get settled by 6/30 the wage [indecipherable] which is retro to 5/1 would come off as would check off [indecipherable] union security.

We told them that if we get finished early we could have joint bargaining until the 30th [sic].

We don't have issues with many of our unions & need to get this settled. If we pull union security & check off we may not be negotiating jointly.

The General Counsel cites only the first sentence of that notation and not the remainder; which suggests two consequences of agreement by June 30, i.e., no proposal withdrawals and joint bargaining.

By hand-delivered letter of June 17, Derey responded to Vega. Therein, he recited that on May 10, he and Vega had reached a joint bargaining agreement confirmed by his letter of May 11. He characterized Vega's June 14 letter as a "blatant abrogation" of that agreement. He asserted that the Council of Unions had been negotiating since May 10 upon that May 10 agreement understanding that certain designated economic issues would be reserved for joint bargaining and had therefore structured their individual contract proposals upon that understanding. He accused Vega of changing the ground rules and thereby "changing the complexion of negotiations." Derey claimed that the Unions were "severely prejudiced" by that maneuver and threatened to file "appropriate charges" unless the DNA reaffirmed the May 10 agreement. He stated: "We consider your actions sufficiently egregious to support an unfair

labor practice strike.” On June 17, Vega faxed a response letter to Dery stating as follows:

As to your letter of today, I told you that we would engage in joint bargaining when all non-economic issues are resolved. As they have not been resolved, the Company has every right to make economic proposals to any union. The union’s [sic] have the same right and several have exercised that right as recently as yesterday. Your union, for example, discussed health insurance extensively in several recent meetings.

I cannot imagine how your rights have been prejudiced by both the Company and the Union’s exercising these legally protected rights. We continue our willingness to meet with all unions regularly to achieve an agreement as certain of our proposals will expire after June 30.

The June 17 letter thus now asserts clearly the DNA position that it felt free to engage in individual bargaining, including issues the Unions had considered to be reserved for joint bargaining and which, prior to June 15, the DNA negotiators had agreed to “set aside,” “put aside,” “defer” or “reserve” for future bargaining. Jaske testified that with respect to ongoing negotiations with Teamsters Local 372, he continued through June to make a number of proposals which included some of the topics reserved for joint bargaining and agreed to set them aside for future bargaining when the Union so identified them.

At the next DTU Local 18 bargaining session on June 22, Jaske proposed a complete contract with a 3-year term of annual wage increases to the Union of 4-percent, 3-percent and 3-percent, retroactive to May 1 provided the Union ratify a new contract by June 30, and no change in vacations. McKnight testified without contradiction that he told Jaske that since the last meeting, he had done further investigation of the agreement on joint bargaining and that he was “absolutely certain and convinced that the parties had made an unqualified commitment to reserve common economic issues for joint bargaining.” He also told Jaske that he was certain that the commitment to certain agreed upon economic items for joint bargaining was an unqualified commitment and he hoped that the DNA would reconsider its position and honor that commitment. According to McKnight, Jaske responded that the Union had DNA’s proposal. McKnight again bargained as to reserved subjects “under protest.”

Jaske testified merely that they talked about joint bargaining “a bit” and that “we understand that, once the individual issues were resolved, we hoped to be able to get to joint bargaining.” Thus Jaske did not effectively nor convincingly contradict McKnight, whom I therefore credit.

In late June 1995, the DNA informed the Unions that the expired contracts could not be extended beyond June 30.

Jaske testified that because of the filing of the unfair labor practice charge and the accusations of the Unions that the DNA had reneged upon a joint bargaining agreement, he drafted and caused to be sent to all six Unions a letter signed by Vega “to reiterate” the commitment to joint bargaining despite assurances, he testified, which had been given during negotiations. Jaske testified that DNA negotiators had never repudiated the desire to engage in joint economic bargaining. In the July 1 letter, the DNA reaffirmed a commitment to engage in joint economic bargaining “when non economic issues are finished with all the unions.” However, the DNA asserted that neither it nor the Unions “waived their respective rights to bargaining

individually as they apply to each union,” and he asserted that “several unions have bargained on that basis.” No specific examples were cited. The letter then stated:

The [DNA] did not waive its right to make final offers on economics to an individual Union or unions based on the individual economic discussions with that Union if the conditions for joint bargaining have not been satisfied, i.e., overall agreements with all unions on non-economic issues have not been reached.

Our proposals to each individual Union have been based on a four percent (4%) increase the first year, three percent (3%) the second, and three percent (3%) the third. When and if we ever get to joint negotiations, the final overall wage package may be greater than, less than or the same as these amounts. The parties have the same rights in joint bargaining as to fringe benefits other than wages.

The letter concluded that the DNA was now concerned that because of the length of negotiations, the continued excessive staffing costs may jeopardize the viability of the 4-percent, 3-percent, 3-percent wage offer.

The July 1 letter had now clearly progressed beyond the common definition of the word “if” to a definition of “reserved” which did not encompass exclusivity, i.e., agreeing to reserve an item for joint negotiations; it did not mean a party would exclusively negotiate that item in joint bargaining. The Respondent now so argues in its brief. Unfortunately for the Unions, they appear to have relied on the common definition of reserve as follows:

1. To save for future use, or a special purpose. 2. to set apart for a specific person or use¹¹

On July 7, 1995, the DNA met in joint session with the heads of the various printing Unions. The meeting had been requested by the Council of Newspaper Unions. The DNA was represented by Jaske, Vega, Kelleher, and several department heads. The Council was principally represented by Dery, Howe, Attard, Kummer, Young, and Mleczo although every printing Union had a representative present. The meeting took place at 615 West Lafayette in the DNA Academy meeting room. Dery began by saying that the Unions wanted to get negotiations moving and proposed that the parties move negotiations offsite to a hotel, finish up individual negotiations through around the clock bargaining and then move into joint bargaining. The DNA caucused. Its negotiating team had concerns about going offsite not only from the standpoint of cost, but also that it could turn negotiations into a media circus. After the caucus, the DNA representatives expressed their concerns to the Council representatives. The DNA suggested that the Free Press building, which was partially vacant, had lots of meeting rooms and also had Room 100 which was large enough to accommodate the joint negotiations. The union representatives were insistent on their proposal. The DNA representatives caucused a second time and returned. Jaske’s accepted Dery’s proposal—to go offsite, to bargain around the clock to complete individual negotiations and then to go into joint economic bargaining as had been originally agreed.

Following the meeting, Vega’s secretary and Dery’s secretary canvassed the area hotels to determine which ones could

¹¹ See Webster’s II, New Riverside University Dictionary, Riverside Publishing Co. 1994.

accommodate the parties on short notice. The only hotel that could do so was the Ponchartrain, and negotiations commenced there the following weekend.

On July 10, 1995, the DNA and Local 372 Teamsters engaged in individual negotiations at the Ponchartrain Hotel. In the 41-page counterproposal the Union presented the DNA, the Union used the term "economics," as the DNA had in its summary sheets previously, to designate issues that are to be discussed in joint bargaining. During the negotiations, both sides stated they viewed the agent proposal as a major proposal and a strike issue.

During the negotiations, the parties attempted to resolve the compensation to be paid district managers, which was one of the major issues in negotiations. District manager pay was enmeshed with the agency concept in that if the DNA replaced carriers with agents, the districts would increase in size. The parties discussed keying the guaranteed minimum salary to the average number of papers in the district. On June 15, the DNA had given Local 372 a proposal in which the district manager guaranteed minimum salary was tied to the average circulation in the district. Under that proposal, the DNA proposed an \$828.40 minimum weekly salary for district managers in districts under 3000 circulation; an \$888.40 weekly minimum for districts with a circulation of 600–7000; and \$1003.40 for district managers with a circulation of over 10,000. On July 11, Local 372 countered with a proposal which called for a weekly minimum of \$875.40 for a district manager with a circulation of less than 3000—or a minimum that was 5 percent higher than the DNA had offered; guaranteed weekly minimums of \$1,215.40 to \$1,315.40 for district managers who had circulation ranging from 6001–7000, minimums that were from 36.8 to 48 percent higher than the DNA had proposed; and had an absolute ceiling of 7000 circulation on the size of any district.

On July 12, 1995, Local 372 presented a counterproposal to the DNA that rejected the DNA's revised agency proposal—the key proposal for the DNA—and refused to meet again until the DNA was prepared to counterpropose on district manager pay. The July 12 union proposal was costed out at over \$71 million. Jaske stated he had no further movement, and Frank Kortsch, an attorney who was the spokesman for the Unions, abruptly terminated the discussion.

On July 10, in the final bargaining session with DTU Local 18 before the July 13 strike, in the context of a discussion over the shared jurisdiction issue, Jaske again made a proposal for a 3-year contract with annual across-the-board increases of 4-percent, 3-percent and 3-percent that were offered other Unions. Jaske offered the same proposal to GCIU Local 289 whose bargaining committee was also present at the DTU Local 18 bargaining sessions. Jaske explained that the wage increase proposal was no longer retroactive since the June 30 deadline had expired. He said that he was concerned about getting contracts and that he sensed that the Union was concerned that other Unions would do better and offered a "me too" clause to both DTU Local 18 and GCIU Local 289, in case other Unions on the Council did better. After a caucus and further discussion of the jurisdiction issue, McKnight told Jaske that Jaske was mistaken if he thought Local 18 was concerned that another Union would do better than it and that that was the reason negotiations were going slowly. McKnight said that Local 18's real problem was that the Company "had made a solemn commitment to bargaining the economical items jointly with all six Unions." He said that if Jaske was really concerned about pro-

gress and getting negotiations back on track, "the one thing he should do right now was to tell us that he would honor that commitment and reserve the common economic items for joint bargaining." According to McKnight, Jaske responded that he wanted the Union to accept his proposal. Jaske testified that he disagreed that the DNA had reneged. According to Jaske, the joint bargaining issue was merely a passing reference in a heated discussion of the "me too" proposal. According to McKnight, it arose several times. McKnight's more precise recollection is more credible than Jaske's summarization.

On July 12, 1995, the DNA held their last meeting with Local 13N. Manning had been the focal point of negotiations throughout June. By July 1, the parties had agreed how many people would staff a printing press, but they had not agreed upon the economic quid pro quo for the reduced manning. On July 12, the DNA presented Local 13N with a complete contract proposal to resolve all the individual issues between the DNA and Local 13N as a last ditch effort to avoid a strike, according to Jaske. The proposal was to buy out manning, work practices and overtime restrictions. Jaske put a value on the proposal and proposed that it apply over a 3-year period. The proposal included a new term, a wage proposal with the 4-percent, 3-percent, 3-percent across-the-board wage increases, deletion of cost of living and changes in health insurance. This complete proposal retained the current levels of holidays, bereavement and vacations and was dependent upon ratification by GCIU Local 13N.

Howe testified that up to that point, the DNA had not offered a big enough share of the cost savings. He testified in cross-examination that he considered the July 12 proposal to be an individual economic offer but that no resolution was reached because not enough money was offered to the Union under wages to compensate for manning and work practice concessions. He testified that he stated in negotiations the section on medical benefits, COLAS, funeral leaves, and even wages were topics reserved for joint bargaining and that the DNA negotiations did not disagree and responded, "if we get there." In redirect examination, he agreed that although some economic aspects of the offer were compensation for individual concessions, others were not.

Respondent argues, and Vega and Jaske testified, that at no time during the 1995 negotiations did any representative of the DNA, including Vega and Jaske, refuse to participate in joint negotiations; that neither did the DNA attempt to condition its participation in joint bargaining on anything but the agreed completion of individual bargaining and that joint economic bargaining did not take place because individual bargaining with each Union was never concluded. As late as March 4, 1996, Jaske, in a letter to Howe regarding negotiations with GCIU Local 13N on that date asked whether Howe wanted to negotiate an economic issue peculiar to the unit or "wait for joint council negotiations." The General Counsel points out that the letter was preceded by the unfair labor practice charge.

2. Analysis

The General Counsel alleges and argues that on June 15, 1995, and thereafter, the DNA breached its agreement with the Unions as to the bargaining format by progressively, unilaterally imposing three new conditions, i.e., (1) bargaining progress on noneconomic issues; (2) progress by June 30; (3) optional individual bargaining on hitherto reserved economic issues.

The Respondent denies that it unilaterally modified or reneged upon its agreement to engage in joint economic issue

bargaining upon the completion of noneconomic individual bargaining.

The Respondent contends accurately that resulting from the May 9 meeting and ensuing correspondence, there was an understanding between the parties that joint bargaining would take place “as it had in the past and that everyone understood that bargaining on joint economics would take place after noneconomic or individual bargaining with all unions was complete.” Both Derey’s and Romanowski’s testimony did confirm that the joint bargaining format would conform with the preceding negotiation format. Respondent points to prior negotiations where economic subjects were dealt with in individual negotiations and thereby concludes that Jaske’s testimony was accurate when he testified that those subjects designated for joint bargaining in 1995 were not reserved exclusively for joint negotiations. However, it is clear from the factual findings above that the preceding individual bargaining dealt with economic issues peculiar to the individual units as, for example, when specific cost concessions were sought by the DNA. Moreover, as found above, the May 1995 understanding of the parties was not entered into qualifiedly or conditionally. The parties initially formed and structured their individual negotiations with such understanding. They also interpreted their understanding to exclusively reserve the 13 designated topics when they “set aside” those items for joint bargaining and, by their conduct, revealed that they understood the word “reserve” to mean what it is understood to mean by its common English language definition. The DNA’s new found interpretation of “reserve” would negate the Union’s object in entering the agreement and for them, render it meaningless and contrary to bargaining history.

The Respondent argues in the brief that it did not renege upon its agreement by conditioning reserved economic issue joint bargaining upon progress or progress by a certain date. The above factual findings support the General Counsel that such was the clear meaning of the June and July correspondence as well as contemporaneous utterances by DNA negotiators. The ambiguous references to deadlines for individual proposals, and continuing statements that the DNA will bargain jointly “if we ever get there,” do not constitute a clear reaffirmation of the original agreement. If those statements were intended to constitute a reaffirmation, they failed miserably. Moreover, they support the conclusion that the DNA at best was rendering mixed signals of intent that clearly tended to confuse and disrupt the Union’s tactics and strategy which were formulated upon the perceived original commitment. Respondent’s interpretation of such statements as “if we can finish all non-economics in sufficient time prior to June 30, we will meet jointly” as being significant for what they do not say, i.e., a clear repudiation of joint bargaining, is pure casuistry. As found above, the logical inference to be made from such statements is that joint bargaining will not take place unless the deadline is reached. However, even under Respondent’s interpretation that the statement does not necessarily preclude optional joint bargaining, it violates the understanding of an absolute commitment unconditioned by a deadline. By recourse to such shifting and ambiguous statements of intention when it would have been so very easy for these communications industry negotiators to be clear and precise, their good faith is rendered questionable.

Regardless of whether or not Respondent intended or stated an intention to renege upon the bargaining format contention, it argues that as a matter of fact it did not violate the commitment

in actual bargaining as it was perceived by the Unions, because it did not change its bargaining conduct despite the correspondence and statements of its negotiators. It argues that the point for joint bargaining was never reached because there never was a conclusion to individual bargaining.

Respondent points to the July 7 joint meeting where it is undisputed that Jaske unqualifiedly agreed to Derey’s request to enter around the clock, individual negotiations and, upon conclusion, to commence joint economic bargaining.

Respondent argues that economic offers it had made to individual Unions did not abrogate the commitment it had made to engage in joint bargaining. It argues that it made such economic proposals as it had done in prior negotiations, “to resolve the individual issues the DNA had with each particular union.” It cites the DNA standard of living proposal and 4-percent, 3-percent, 3-percent wage offer made by Kelleher to Young at the Mailers Local 2040 negotiation of June 13. Young protested that the DNA “could not get credit” for an annual wage increase when they were negotiating strictly individual concessions and Kelleher quickly agreed, saying he understood and promised that the wage proposal would be on the table when they got to joint bargaining. This is cited as one of the proposals Jaske described as an attempt to resolve individual concessionary bargaining before June 15. Respondent relies on Young’s cross-examination testimony to argue that Young considered it to be an individual proposal. What Young testified to was in fact a broad acquiescence that Local 2040 received only individual proposals prior to the strike. However, his direct testimony deals with a specific meeting and is contradicted that Kelleher quickly withdrew the 4-percent, 3-percent, 3-percent proposal, deferring it to joint bargaining. It is therefore inaccurate to characterize Kelleher’s wage offer as a serious stratagem to achieve quick agreement.

Respondent cites also the July 12 negotiation of the manning work practices and overtime restriction buyout proposal to Local 13N which Howe considered to be an insufficient buyout offer.

Respondent argues in its brief as follows:

The fact that wage proposals were made in an attempt to buy out unacceptable manning or overtime practices in individual negotiations did not prejudice joint bargaining. If the parties had gotten to joint negotiations—something that never happened because of the failure to reach tentative agreements in individual bargaining . . . —the unions could have negotiated rates that were equal to or greater than those that might have been reached in individual negotiations. Rather than prejudice the unions, it would seem that better agreements reached on economic terms in individual bargaining would have established a floor from where joint bargaining would commence.

The General Counsel argues that after June 14, the DNA pursued a new bargaining strategy by bargaining with each individual Union on all subjects including those received for group bargaining, as is evidenced by Jaske’s “bargaining conduct and the terms of proposals made to each of the Unions.”

The General Counsel accurately notes that the DNA offers to each Union was the “same basic offer which had been the basis of full and final agreement reached with other Unions, including wages and health insurance,” and made with the objective that those offers would form the basis for settlements with the six Unions. The General Counsel correctly notes that

whether the notice therein would have been timely had individual negotiation commenced.

I agree with the General Counsel that the *Boston Edison* case is applicable to the issues herein because it does extend the *Retail Associates* rationale to multiunion, two-stage joint bargaining agreements. I also agree with the General Counsel's further argument that the facts of *Boston Edison* are manifestly different from those herein. In *Boston Edison*, the topic reserved for joint bargaining was a single, isolated, self-contained issue historically bargained about on its own footing. The issues reviewed for joint bargaining by the DNA and the Unions were more numerous and complex. Had they not been reserved, they could have and would have impacted the calculated quid pro quo in the exchange of proposals in individual bargaining. This is precisely why the Unions wanted to reserve those topics for joint bargaining. For example, the Unions wanted to focus upon individual issues and to be unencumbered by the weight and complexity of issues that tended to have a commonality of interest to all units. Given agreements of the DNA, the Unions accordingly entered upon individual bargaining, having forged their strategies upon that commitment given by the DNA. The DNA's dissatisfaction with individual bargaining progress caused them to at first renege on the commitment by unilaterally demanding deadlines and then, in further frustration with the lack of progress, to infuse into negotiations reserved bargaining topics clearly divisive of the agreed-upon, two-stage bargaining process and inherently inimical to its terms.

I agree with the General Counsel that once parties commit themselves to a multiunion, two-stage joint bargaining agreement that the same principles of stability of labor relations underlying *Retail Associates* rationale must apply. Therefore, no party ought to act in derogation of such an agreement except for extraordinary circumstances, not in issue here, or a timely manner by giving adequate and unequivocal notice.

I agree that Respondent's insistent infusion of reserved point topics tended to be disruptive to the bargaining process which had commenced and been conducted in a manner in reliance upon the commitment to the agreed-upon, two-stage format. I conclude that it is not wholly accurate to contend, as Respondent does, that it acted timely because joint negotiations had not yet occurred. The agreed-upon bargaining format formulated in reliance on that commitment had commenced, and withdrawal from that commitment tended to violate the concepts of labor relations stability underlying the *Retail Associates* rationale for no other reason apparently than Respondent's subsequent dissatisfaction with the progress of negotiations. Further notice was not unequivocal. Respondent negotiators' shifting and ambiguous reassurances, if not calculated to do so, tended to be disruptive to the Union's approach to and understanding of the bargaining format and, in themselves, constituted evidence of bad faith. Accordingly, I find that Respondent violated Section 8(a)(1) and (5) of the Act as alleged in paragraphs 19 and 20 of the fourth consolidated complaint.

D. Case 7-CA-37361—DTU Local 18 Bargaining (Complaint Pars. 16, 21-23)

1. The issue

The complaint alleges:

16. (a) On or about June 17, 1975, Respondent News and Typographical Union No. 18 entered into a "Memorandum of Agreement" which contained, inter alia, job

guarantees and work arrangements, for Unit members of Typographical Union No. 18, which agreement is not subject to amendment except by mutual consent of the parties.

(b) On or about January 10, 1975, Respondent Free Press and Typographical Union No. 18, entered into a "Memorandum of Agreement" which contained, inter alia, job guarantees and work arrangements for Unit members of Typographical Union No. 18, which agreement is not subject to amendment except by mutual consent of the parties.

(c) On February 16, 1988, Respondent Detroit Newspaper agreed to adopt the obligations of the Memoranda of Agreement described above in paragraphs 16(a) and 16(b), when it began operations.

....

21. On or about May 11, 1995, Respondent Detroit Newspaper, unilaterally and without agreement with Typographical Union No. 18, implemented a bargaining proposal which modified and redefined the scope of the bargaining unit represented by that labor organization and/or which also modified the "Memorandum of Agreement" described above in subparagraph 16(a).

22. The subjects described above in paragraph 21 are not mandatory subjects of bargaining.

23. Respondent Detroit Newspapers engaged in the conduct described above in paragraph 21 without having reached a valid impasse on the subject with Typographical Union No. 18 and/or without the consent of Typographical Union No. 18.

The proposal in issue was included as item 1 in the DNA's list of demands that initiated negotiations with DTU Local 18 in February 1995. It reads as follows:

Notwithstanding any other provision of this agreement, the jurisdiction descriptions set forth in the contract are non-exclusive. Employees of other departments of the Agency as well as employees of the Detroit News and Detroit Free Press may perform such work as is necessary including, but not limited to in-putting of text and graphics, creation and in-putting of ad, manual or electronic makeup or alteration of add [sic] (whole or partial pages), the inputting of computer program changes and codes, and the makeup of whole or partial pages. Material received from outside concerns will also be processed. To the extent that anything in the main contract is in conflict with this side agreement, this side agreement shall control. (By making this proposal the Agency does not concede that it has previously breached this contract.)

The Respondent DNA argues that it had explicitly adopted only part of the Memorandum of Agreement (MOA), i.e., the job guarantee section. The Respondent further argues that its proposal 1 was a proposal to change the jurisdiction provision of the expired collective-bargaining agreement, under which the printer's bargaining unit was granted exclusive jurisdiction over, inter alia, certain composing room work performed with computer technology inclusive of video display terminals (VDTs) and scanners for the processing of retail and classified display ads. Respondent's object, it asserts, was to obtain a shared jurisdiction agreement whereby it would be able to assign bargaining unit work to previous nonunit personnel for efficiency and cost savings purposes. For example, it sought the right to assign to nonunion marketing department personnel,

form with subsequent legal understandings so strongly that they actually convince themselves that what they wanted said was in fact said.

The General Counsel argues that Jaske was not corroborated in detail by Kelleher. I already discussed that subject. With respect to Douglas, it was a question of Respondent proving a negative, i.e., that there were no references to the representational status of proposal 1 nonunit employee assignees of unit work. Kelleher's notes had no reference in them to that subject as apparently Robbins' notes also did not. In that sense, they corroborated Jaske as did his testimonial nonrecollection. It is undisputed that McKnight, the attorney, did raise the issue. How Jaske responded is supported by Kelleher's notes which his testimony tracks. The General Counsel is not in a position to refer to Jaske's noncorroboration with detailed testimonial evidence. The General Counsel has the burden of proof but has proffered no corroboration of the negotiator-litigator-witness, McKnight, save for his own subsequently crafted memorandum.²⁷

The General Counsel argues that McKnight's demeanor was superior. Indeed, the ebullient McKnight was the more emotive, if not theatrical, personage. Jaske's demeanor, as his courtroom presence, was stark, cold, emotionless. Jaske tended to evade and obfuscate, as noted elsewhere, with respect to the DNA joint bargaining strategy formulation as to the issue of the DNA adoption of the MOA, and regarding Guild negotiations, he resorted to gross exaggeration. Further, his tendency to make argumentative points beyond the required response in cross-examination gave the impression of calculation and not spontaneity that is usually indicative of candor.²⁸ Moreover, his examination continued over 3 days, his responsiveness diminished radically, but it was difficult to discern whether pure fatigue was more causal than lack of certainty. I did not find McKnight totally responsive either. For example, he forcefully denied that at a certain meeting, Jaske characterized proposal 1 as that of "shared jurisdiction." But he grudgingly admitted that the words did appear in his own sparse notes. Yet, he refused to attribute the phrase as a recollection of a stated DNA position despite the clear contextual inference. Furthermore, his June 15 memoranda read like a script for his testimony.

In the final analysis, basing a credibility resolution solely upon the spontaneity of an attorney-witness is extremely dissatisfying. This is so particularly with respect to trial attorneys whose courtroom experience has conditioned them to project a calculated demeanor as an advocate. Such conditioned behavior gives the attorney-witness an advantage over the nonattorney witness and even other attorney witnesses who have a less masterful or colorful courtroom presence.

Thus, although McKnight's demeanor was more impressive than Jaske's demeanor on this issue, a credibility resolution requires closer examination of the varying versions of what was said at the June and July meetings.

The June 15 meeting was the first one attended by McKnight. The testimony and notes of Kelleher are all in accord with the general flow of discussion and what was said, except for the way certain Jaske statements were phrased regarding proposal 1, and although each witness recalls state-

ments not in the other's testimony, I credit such testimony where it is not explicitly or implicitly denied or mutually exclusive.

The meeting started with a review of the status of the DNA's proposed 34 demanded changes in the collective-bargaining agreement, which McKnight asked if all were still on the table. Jaske responded that yes, it was correct except for one minor issue. Jaske also pointed out some subsequent counterproposals that the DNA had made regarding health insurance. Thereupon, the parties discussed the joint bargaining issue. There was a reference to wages. Jaske stated that parties had reached impasse. McKnight asked how that was possible if they had not yet discussed the reserved economic topics. Jaske said impasse had been reached on proposal 1 which, in effect, had been implemented on May 11, the day of impasse declaration at the meeting of that date upon receipt of the Union's written statement of position. McKnight then stated that he was familiar with that letter but that DTU Local 18 was willing to negotiate proposal 1 in the DNA list of demands to the extent that it dealt with the Union's jurisdiction and it was not the Union's intention to refuse to bargain over jurisdiction despite the Union's written statement of that position. McKnight said he was concerned over the impact of proposal 1 upon the bargaining unit but he was willing to be flexible. Admittedly, Jaske stated that proposal 1 would not change the unit. I find that Jaske also said the DNA was seeking "shared jurisdiction." He is corroborated by Kelleher's notes, and he is not effectively contradicted. Admittedly, Jaske said that the DNA was seeking flexibility for efficient computer age operations, i.e., the flexibility to assign work in the pre-press making up of ads to anyone it wanted, which would include graphic designers who were then in the unit.

Admittedly, McKnight asked if DTU Local 18 would, under proposal 1, represent the employees outside of the composing room to whom customary printers' work would be assigned. The dispute is whether Jaske responded that if the work would be assigned to employees "in the bargaining unit" (Jaske) or "in the unit" (Kelleher's notes), then they could be represented by the DTU Local 18 but if not, then the Union would not represent them (Jaske); or whether he responded as McKnight testified, that it depended upon whether or not they were in the composing room, i.e., if they were not in the composing room itself, then they would not be in the unit.

Jaske asserted to McKnight that the Union need not worry because the DNA would honor the so-called lifetime job guarantees of composing room employees. Jaske testified without explicit contradiction that he told McKnight that the DNA neither wanted to increase nor to decrease the bargaining unit. Similarly, he testified that with respect to the graphic designers' performance of the makeup computer functions of printers' ads, he told McKnight that if they were in the "unit, fine," but if not, "fine." Kelleher's notes are similar but add Jaske as stating: "We have not changed the definition of the unit—if they weren't part of the unit."

Instead of proffering Robbins' official notes in corroboration of McKnight, only the sparse contemporaneous notes of McKnight were offered for the June 15 and 22 meetings. They are too cryptic to be of any real value. I also received into evidence, as noted earlier, the less probative typed memorialization of the June 15 meeting. In the typed version, Jaske prefaced his response to McKnight's representational question with the statement that he did not know, thus giving the impression

²⁷ The June 15 notes of Robbins were, upon objection, offered and received only for the part relative to Vega's participation on the joint bargaining issue.

²⁸ When cross-examined by Jaske, McKnight was not entirely free of the same conduct.

inference of the notes. The refusal to concede this one point eroded McKnight's credibility to a significant degree in view of his initial display of sincerity and forcefulness in the initial denial.

Kelleher left the July 10 negotiating session before the meeting ended. Therefore, his notes are incomplete. However, the notes of Ashley King and Keith Pierce both support Jaske's, and not McKnight's, account of what was said regarding the right of the Union to go to the NLRB and seek to represent employees to whom work may be transferred under DNA proposal 1.

Following the meeting, Jaske wrote a letter to McKnight on July 13. The purpose of the letter was twofold—to confirm that McKnight had received the information sent to him regarding the graphic designers and to reiterate the statements Jaske had made at the end of the meeting. The letter read in pertinent part:

If after reviewing the information you persist in your claim that they should be added to the bargaining unit, we believe that should be properly submitted in a unit clarification proceeding to the Labor Board.

As discussed in negotiations, nothing in our work transfer proposals to either union precludes you from claiming that these employees or any other employees should be properly considered part of either or both bargaining units.

McKnight did not respond until after a lapse of 3-1/2 weeks when, on August 3, he wrote to Jaske the following cryptic denial of Jaske's assertion regarding the July 10 discussion:

Today for the first time I actually read your letter dated July 13, 1995 regarding "ITU/Engraver Negotiations." I want you to know that I do not agree with your version of what was discussed in negotiations.

To borrow from Respondent's arguments as to the May joint bargaining agreement, McKnight's letter is significant for what it does not say. It does not categorically deny that Jaske made a reference to the Union's right to assert a claim to the Board for representation of the disputed employees. It does not assert that the DNA had insisted in negotiations that the Union waive such right. It does not reiterate that the DNA had insisted upon union representation limited to the four walls of the composing room. It does not explain how Jaske's letter is inaccurate, or as to what it is inaccurate. The letter simply asserts that in some unspecified manner and subject, McKnight disagreed with Jaske's recollection. The question is, what and how? Is it inaccurate in terminology or substance? The delay in responding and a failure to make a record of what McKnight later testified occurred is inexplicable for this experienced negotiator-litigator-witness who, for at least the meeting of June 15, took time soon after to dictate a detailed file memoranda which he reviewed a month later and took time to add written interlineations.

In cross-examination, McKnight was asked why he did not file a unit clarification petition. He answered: "Because I didn't want to. I didn't think it was legally necessary or appropriate. I thought you'd bargained in bad faith."

I have some doubts that the General Counsel sustained his burden of proof by submitting solely the uncorroborated testimony of a negotiator-witness-litigator. But if constrained to make a credibility recollection between two negotiator-witness-litigators, both of whom are not wholly convincing witnesses, I

must find that the testimony of McKnight is not sufficiently reliable and accurate to support the burden of proof and on this issue. I credit Jaske.

First, the testimony of Jaske has been credited as to the negotiations up to and including May 11. I note that Douglas' credibility is further eroded by Jaske's tentative response to McKnight's representational question on June 15, according to McKnight's notes which indicate that it was not raised previously. Jaske, in other respects, has displayed a tendency to evasion and obfuscation. However, I find it improbable that he made such a direct blunder by clearly committing the DNA to a position so inapposite to that of clear outstanding Board precedent to an experienced attorney-labor negotiator. Further, I found McKnight least persuasive as to whether Jaske told him to file a representation petition if he so desired. I find McKnight's testimony and his testimonial demeanor unconvincing on that issue. The General Counsel derides Jaske's July 13 letter as "legal posturing." Well, the same can be characterized of McKnight's file memorandum dictated, he says, on the late afternoon of June 15 into a tape recorder in a "stream of consciousness" narration. The same "legal posturing" can be attributed to his inconclusive and inexplicable response to Jaske's July 13 letter, which was composed and drafted in less than 3 days after the event and is at least corroborated by some concurrent bargaining notes, unlike the uncorroborated McKnight. Even if Jaske did not make that commitment, as claimed in the letter, the letter itself is more than posturing because it clearly withdraws any previous suggestion that the Respondent expected the Union to waive any representational rights, and moved Respondent within the purview of the *Antelope* rationale. After that letter, the Union did not respond with any counteroffer on the assignment of unit work. The letter is therefore substantively significant. However, I find that if Jaske, an attorney-negotiator as experienced and well versed in Board law, had not made references to the Union's lack of a right to assert a jurisdictional claim, McKnight would not only have pinioned Jaske with a detailed contradiction, but would have more likely have sent his own confirming letter of what was said well before that; or have dictated another stream of consciousness file memorandum; or at the very least have highlighted it in contemporaneous bargaining notes. If such existed, they were not proffered into evidence, although McKnight claimed that he customarily took such contemporaneous notes.

Having concluded that Jaske is more creditable with respect to his references to the Union's right to assert representational rights before the Board, not only on July 10 but at earlier meetings, I find it improbable that he would have phrased his responses to McKnight's inquiries on the representation of non-unit employees assigned unit work in such a manner as to support an inference that the DNA was insisting upon a representational waiver by proposal 1. I must conclude that Jaske's testimony and his limited corroboration by Kelleher and Kelleher's notes are ultimately more convincing and probable than McKnight's testimony which, for no explained reason, was uncorroborated either in whole or in part by witnesses who testified on other matters or who were shown to have been unavailable to testify.³³

I therefore find Jaske did not, in negotiations either before or after May 11, 1995, make any clear or reasonable construable

³³ Respondent claims in the brief that Attard was present in the hearing room as an observer.

merit pool based on the minimum salaries in the contract” of 3-percent in the first year, 2-percent in the second year and 2-percent in the third year. Anyone over the contract minimum would have their pay determined purely on merit.

Mleczo testified that Kummer asked several questions regarding the timing of the distribution of the merit raises, how much money was involved in the distribution and what “vehicle or formula” was to be used in determining this amount of money.” He testified that Jaske responded, with respect to the timing of distribution that he was not sure but would get back to Kummer on that and that Jaske said he could not provide any specific amounts. Jaske testified that he told Kummer that the amount remained to be calculated. Mleczo testified that other than Jaske’s saying the merit raises would somehow be tied to annual performance reviews, “we could not ascertain [sic] any specific formula or calculation that was used on how much each person would receive.”

In cross-examination, Mleczo added that Jaske also explained in response to Kummer’s questioning that the base 1 percent would be retroactive to ratification and that the range of merit raises would be from 2-percent to 6-percent, with an average of 4-percent in the first year of the base rate or top minimum paid each employed in each classification, data of which, he claimed, the Union routinely and periodically received from the News. Jaske admitted that Kummer did not merely ask him broadly about the formula but that Kummer asked a number of questions including how the pool would work (stating that how the money was distributed was critical) and asked how the money would go in and come out.³⁷

Kummer complained that the proposal effectively eliminated union involvement from the merit pay program. Jaske responded that the Union could pursue a nonarbitrable grievance. Jaske testified that Kummer said that the Union was generally opposed to merit pay and did not like it, to which he, Jaske, responded that the News was “wedded to it, very interested in it.” When Kummer asked if there was something in writing, Jaske said that the News could provide something if the Guild “were interested in moving ahead.” Kummer stated that he had a meeting coming up with the membership and would like to be able to explain the News’ position and wanted something in writing. Jaske agreed to provide something.

The General Counsel argues that:

The dialogue on April 25 failed to clarify such points as:

the dollar amount that the News proposed to dedicate to the merit pool in each contract year;

whether the recipients of the described “merit pool” money would be only those employees paid at scale, or also those paid in excess of the minima;

whether the guaranteed 1% would be allotted to all unit employees or only those paid at scale; and

whether the contract minima would be increased independent of the merit system.

However, there is no evidence that all of these specific questions were asked. The General Counsel argues:

The formula to be used to determine the percentages referred to in Jaske’s calculus was similarly cloudy. Jaske stated, in response to Kummer’s question concerning the formula, “We would use 4% of the minimum in each category.” This did not explain how many “minimum” wages would be added before the News multiplied by a factor of .04. Moreover, each job category set forth in the contract had multiple minima corresponding to different experience levels. Jaske’s response failed to clarify whether the percentage would be based upon the highest step of the scale, the lowest, or perhaps some average.

Again, there is no evidence that these precise questions had been asked by Kummer. However, it is clear that Kummer’s questions indicated that he was seeking from the News as much explanatory information about the proposal and how it would function as the News was capable of giving. All that Kummer possessed to present to the membership was a skeletal outline with promises of further explanation.

Later that day, according to Jaske’s testimony, he and Giles discussed the News’ merit pay proposal and whether they should make any further modification in view of an upcoming union meeting, and they also decided that rather than tie merit strictly to minimums, it would be simpler to apply merit to all salaries. The change is significant because the vast preponderance of unit employees was receiving more than the basic contract minimums for their classification. Giles and Jaske agreed to propose a 1-percent across-the-board increase with all increases averaging 4-percent the first year, 3-percent the second, and 3-percent the third. They then drafted a proposal which the News alleges reflects these changes.

On April 27, Jaske sent a copy of the News’ revised proposal to the Guild’s office by facsimile. He then called the Guild’s office and spoke to Kummer’s assistant, Luther Jackson, and made sure the proposal had been received. Jaske left word that he would be available if Kummer needed to meet briefly to discuss the proposal. Jackson replied that Kummer received the proposal, understood it and that a meeting would not be necessary. The document encompassing the proposal does not explicitly define what the percentage base is, i.e., actual salary rather than contractual minimum.³⁸ The proposal did state that the performance evaluations, which had been arbitrable in the past, would now be grievable but not arbitrable. This is a significant retreat in union merit pay involvement from the prior contract.

At the fifth negotiation meeting on May 3, Kummer reported the membership’s reaction to the merit pay proposal. I find Kummer more credible than Jaske as to what was said at this meeting because Jaske’s exaggerations were exposed in cross-examination and revealed the inaccuracy of his recollection which was not even supported by Smith’s notes. For example, in his direct examination, Kummer supposedly reported that the membership is not “in any way interested in merit pay.” In cross-examination when confronted with Smith’s unsupport-

³⁷ Smith’s notes reflect that Kummer pointed out to Jaske that some employees would be reviewed for performance in January and others later in the year and that the date of their merit pay distribution would affect the amount of raise received because of the change, the amount of money in the pool at that time, to which Jaske agreed but noted that further discussion was necessary.

³⁸ Giles testified that the News’ initial merit pay proposal contemplated using the highest rung of the scale ladder as the basis of the percentage computation. No witness, including Jaske, corroborated Giles’ assertion. When asked where that concept was written, Giles could not answer nor could he remember actually discussing the maximum scale idea with Jaske.

merit pay and health insurance. They then went through the various proposals that were still on the table and other contract sections opened by the proposals.

The parties met again on August 22. Dale was the chief spokesperson for the Guild. He proposed that the News drop all of its noneconomic proposals and that the Guild drop all of their noneconomic proposals and that economics be submitted to the joint Council and whatever they agreed upon would be the economics for the Guild. After a caucus, Jaske responded that the News was not interested in turning their negotiations over to the Joint Council and had to negotiate their own contract. Jaske asked if the Guild wanted to negotiate as to the merit pay increases that had already been given. Dale responded that they viewed the News' position as illegal and therefore were not in a position to respond.

The parties met again on October 16 and 17 for the limited purpose of discussing the merit increases and overtime. Ice was the Guild's chief spokesperson at both these meetings. They reviewed what had occurred up to then. Jaske asked if the Guild desired to bargain about those increases already effectuated. Ice responded that the News would have to first rescind the increases. When Jaske replied that the News was not interested in doing that, Ice said that the Guild would not bargain regarding any increases already put into effect but would bargain prospectively on proposed individual raises.

The parties discussed those individuals whose increases had not yet been put into effect but who had been put into abeyance. The Guild asked questions about whether the News had used a formula with regard to those increases and whether some matrix or grid was used to come up with the increases. Jaske responded that there was no such matrix or grid and that the News had based these on "the evaluations, on the persons' contribution, capabilities." He explained that there was no formula and no percentage applied to a particular classification. The Guild again proposed that the individuals each get an across-the-board increase of \$75. Jaske responded that the \$75 was too large and did not deal with merit and therefore rejected the proposal.

The Guild repeated their prior question as to who would be exempt from the identification of employees who the News felt would be exempt from overtime. Ice asked: "assume that everybody applied today. Who would be exempt?" Jaske responded that he saw no purpose in trying to go through that exercise, which would require the News to evaluate the duties and responsibilities under the law of a large number of people, since he asserted it was not something that was likely to come to pass. Ice also asked who would make the initial determination with regard to who might be exempt from overtime. Ice again suggested going to the Department of Labor for a determination. Jaske said that he would respond to various questions from the Guild the next day.

When the parties met again the next day, Jaske responded to some of the Guild's questions and proposals from the previous day. He turned down the \$75 proposal. He also stated that he did not feel that going to the Department of Labor for a determination as to exemption from overtime was the proper way to proceed. Ice proposed uniformity between classifications on the basis of ratings for increases. He pointed to two employees—House, a reporter, and Jones, an editorial assistant—and asked why House was getting a greater percentage increase even though he got the same evaluation. Jaske replied that there was no intention on the part of the News to have consistency as to

classification. Ice argued that a reporter has a higher base pay and will get a higher raise and therefore the percentage should be the same. Jaske argued further that the reporter classification is the "lifeblood" of a newspaper and should receive a higher percentage raise. He thereby inadvertently disclosed something the Guild had yet to learn and had asked about before, i.e., at least deference was attached to classification when determining merit pay raises.

During this meeting or the day before, Ice had proposed that only evaluation of less than 3 month's age be relied upon and had asked that a particular employee be reevaluated. Jaske, however, responded that the employee had not asked for a re-evaluation. The clear implication that the Union had no standing to independently request such reevaluation was reinforced by subsequent correspondence. Ice thus gained another information tidbit about pay program. Jaske testified that he did agree with the Guild's proposal that stale evaluations not be utilized. However, he rejected Ice's proposal that those rated "acceptable" should be eligible for merit pay. During this meeting, Ice reduced the Guild's proposal from \$75 weekly increase for all individuals to \$64. The News rejected the proposal since it was an across-the-board increase which did not address merit.

The parties met again on November 1. This meeting dealt exclusively with overtime issues. By way of example, the Guild asked about how the News had come up with an overtime proposal for unit employee Pepper. Jaske responded that the News had looked at what Pepper might have overtime in the future, since there was no record of overtime in the past.

When Ice asked who would make the determination on overtime to compute a salary, Jaske responded that the editors would make the initial determination as to whether an individual should be offered a salary and what it should be and then bargain with the Guild about it.

The parties met on May 9, 1996, at which the second round of merit increases was announced as due on May 1, 1996. The parties discussed certain individual merit pay proposals. Ice noted what appeared to be reverse results in amounts in relation to evaluation ratings which were defended by Jaske as "judgment of management." Jaske stated that performance ratings were not necessarily tied to percentage increases. This baffled and astounded Ice who demanded that Jaske define exceptions to what he understood was the underlying premise that increase in pay was proportionate to higher ratings. Jaske merely stated that it was a determination made in the discretionary judgment of management. Jaske further stated that there was no range of percentage raises set for each evaluation rating and that an employee rated outstanding could receive anywhere from 0 percent to 20-percent raise. This announcement ran contrary to Giles' staff memoranda, the merit pay letters to employees and Giles' testimony that all employees rated outstanding or commendable received a merit pay raise in 1995. Furthermore, Jaske now also announced that even employees rated as "acceptable" were eligible for a merit raise, if it was decided appropriate by management. When the Guild negotiators noted that the News was proposing no second round merit raises for any employee rated "acceptable" and asked if that were a result of a rule, policy or coincidence, Jaske answered that it was just the result.

When the parties met again on June 13, 1996, Jaske again reiterated that the merit pay determinations were management's "individual subjective call."

3. Analysis

a. Merit pay implementation

(1) The McClatchy theory

In *McClatchy II*, the Board, responding to the D.C. Circuit's instructions on remand, explicated a new analysis in support of its finding that the respondent employer violated Section 8(a)(5) and (1) of the Act by the unilateral implementation of a merit pay increase proposal despite a lawful bargaining impasse. It reasoned as follows:

In brief, we find that the preservation of the integrity of the collective-bargaining process requires that we recognize a narrow exception to the implementation-upon-impasse rules, at least in the case of wage proposals, such as the one at issue here, that confer on an employer broad discretionary powers that necessarily entail recurring unilateral decisions regarding changes in the employees' rates of pay.

Specifically, were we to allow the Respondent to implement without agreement these proposals, such that the employer could thereafter unilaterally exert unlimited managerial discretion over future pay increases, i.e., without explicit standards or criteria, the fundamental concern is whether such application of economic force could reasonably be viewed "as a device to [destroy], rather than [further], the bargaining process." [W]e find that if the Respondent was granted carte blanche authority over wage increases (without limitation as to times, standards, criteria, or the Guild's agreement), it would be so inherently destructive of the fundamental principles of collective bargaining that it could not be sanctioned as part of a doctrine created to break impasse and restore active collective bargaining. 321 NLRB 1386, 1388 (1996) (fn. citations omitted).

In *McClatchy III*, the Board described the facts before it as follows:

In short, after the contractual parties bargained unsuccessfully for 3 years for a successor collective-bargaining agreement, the Respondent unilaterally implemented its final negotiating offer on May 21, 1990. There is no dispute that the parties' bargaining had been in good faith and that a lawful impasse had been reached before implementation. The final offer provided, inter alia, for salary increases based on merit; they were to be determined at the Respondent's sole discretion, based on its annual evaluation of job performance. Pursuant to these terms, the Respondent granted merit increases to 77 unit employees between May 21, 1990, and the time of the unfair labor practice hearing. Consistent with the implemented provisions, the Union's role in the merit increase procedure was limited to those situations in which a unit employee chose to appeal a merit increase determination and further chose to request representation by the Union in the appeal process.

The Board went on to find:

On October 12, the Board affirmed the administrative law judge's Decision and Order and modified its recommended remedy to include a status quo ante Order. *Detroit News, Inc.*, 319 NLRB 262 (1995). On October 16, the News stipulated to a voluntary dismissal, with prejudice, of its breach-of-contract district court lawsuit.

The instant case is controlled by the Board's decision in *McClatchy II*. The Respondent's obligation was to negotiate to agreement or to impasse "definable objective procedures and criteria" governing raises under its merit pay proposal prior to implementation of the proposal. As in *McClatchy II*, "no such substantive negotiations ever occurred."

Consequently, the unilateral implementation of the Respondent's discretionary merit pay plan was inherently destructive of the statutory collective-bargaining process, and an exception to the postimpasse implementation rules is therefore warranted. Accordingly, and as more fully explained in *McClatchy II*, we affirm the judge's conclusion that the Respondent violated Sections 8(a)(5) and (1) in view of its failure and refusal to satisfy its obligation to bargain with the Union prior to granting merit wage increases to unit employees.

In *McClatchy II*, the Board considered that the merit pay proposal would permit the employer to exert "unlimited managerial discretion over future pay increases, i.e., without explicit standards or criteria," which it conceded probably would not be entirely arbitrary, but which proposal did not require a statement of criteria or standards upon implementation. 321 NLRB 1386, 1390. The Board concluded that were it to permit implementation, the union would not be able to bargain knowledgeably nor have any impact on the determination of unit employee wage rates. It noted, however, that its decision did not preclude an employer from "attempting to negotiate to agreement on retaining discretion over wages increases [and] absent success in achieving such an agreement, nothing in our decision precludes an employer from making merit wage determinations if definable, objective procedures and criteria have been negotiated to agreement or to impasse." It found that no such negotiations had occurred. It further found that the employer refused to allow the union to negotiate procedures and criteria, but also failed to provide to the Union notices of forthcoming specific merit wage increases or to allow the union participation on any appeal of merit pay other than upon invitation of the individual employee. Id. at 1390-1391.

Respondent argues that the facts of this case are distinguishable from *McClatchy* and *Colorado Ute*, supra, in that its proposal did not constitute an attempt to cause the Guild to relinquish its statutory role, i.e., there was provision for the Guild's involvement in the evaluation and appeal process and, further, the proposal was not entirely for merit pay only and the Guild, it claims, could calculate the amount of merit pool money by virtue of its percentage of employees' salaries.

I agree with the General Counsel and the Guild that the facts of this case do not distinguish it from the *McClatchy Newspapers* precedent but rather emphasize its similarity, e.g., lack of notification as to specific unilaterally determined merit increases; Guild participation in a nonbinding appeal process but only upon invitation of the affected employee and a nonarbitrary pay determination. An after-the-fact offer to negotiate without status quo ante restoration did nothing to rehabilitate the harm done to the Guild's representational status.

It is clear from these facts that not only was there no meaningful bargaining of a statement of definable criteria or standards prior to implementation, but that whatever obtuse responses Jaske gave in persistent requests for information were confounded by his postimplementation representations, particularly in 1996.

reached, a status quo ante remedy was not warranted, citing *NLRB v. Cauthorne*, 691 F.2d 1023, 1025–1026 (D.C. Cir. 1982), and *Storer Communications, Inc.*, supra. Since I find that there was no good-faith impasse on proposals 7 and 11 proven by the News, the theory has no factual support, and there is no need to evaluate the validity of the cited precedent to these facts where the subsequent bargaining and impasse did not involve proposal 8, which was in significant part the subject of the unfair labor practice determination.⁵⁰

c. Post-July 5 information requests

(1) Merit pay

The News argues, much as it does with respect to the preimpasse information requests for the merit pay proposal information, that it satisfied those requests by explaining to the Guild that there was no formula used to determine merit pay and none could be given. With respect to criteria or factors such as a particular rating, it argues that such information could not be given because that criteria did not “guarantee” merit pay or the amount of merit pay and that consistency between classifications was not its intention. The Guild sought to know not whether there were any guarantees, but just what were definable criteria, i.e., factors considered or guidelines upon which determinations were made. The Guild was led to believe in negotiations before 1996 that somehow there was a relationship between evaluations and merit pay determinations which was not purely arbitrary. The Guild was not given even the limited information the News provided in its staff memoranda. Surely the News does not take the position that it sought to give the impression to the unit employees that the merit pay proposal fairly utilized some kind of observable phenomena as criteria, while at the same time, it told the Guild that it had no specific criteria to disclose.

With respect to classification relationship to merit pay, Jaske disclosed that it indeed was a relevant factor, one which it had not earlier disclosed, at least with respect to the reporter classification.

The Respondent argues that the Guild had known the relationship between performance evaluation guidelines and past merit pay and how it operated and therefore “the Guild’s claims that they were not given information about the Company’s proposal are groundless.” It points to no record evidence to support the implication in its argument that the Guild was told that the relationship between evaluations and merit pay and its operation would be identical to past practice.

Again, the News argues that the Guild never asked such questions as to whether employees rated acceptable might not get a raise nor, it claims, did it ever ask who would receive an increase. It argues that the Guild was seeking a formula where one does not exist. As already discussed above, the Guild was not simply asking for a rigid formula. Certain factors were asked about and other factors were implied, if not expressed, in its informational request. There is no excuse for the News’ failure to disclose relevant determinant factors and other information it had in hand by July 10, simply on the ground that the

Guild sought only a formula disclosure. The News did not, as it now argues, have to “guess” what the Guild wanted to know. Such information was reasonably implied, e.g., that competitive pressures “inference a raise.” That is what they wanted to know, i.e., influencing factors, and, moreover, it asked a variety of questions about the proposal and not merely asked for a formula. The News, in effect, argues that the Guild somehow should have divined specific factors in the News’ thought process and their formulated precise questions.

I conclude that the News breached its good-faith bargaining obligations before and after July 5 by continuing to refuse to disclose requested information about the merit pay proposal necessary and relevant to the Guild’s representational and bargaining obligations.

(2) Proposal 7—information requests

The Guild’s pre-July 5 request for a listing of all unit employees whom the News considered to qualify for exemption under the FLSA was reiterated on July 10 and 11 and in August. This time it was phrased to avoid the evasion that the News did not know who would apply. The Guild was not asking who the News thought would apply but who it considered to be qualified, given present duties. By July 10 and 11, the significance of this information had been stressed by the Guild, i.e., it was not employee identity per se that was crucial, but it was the scope and impact of the proposal. Yes, Ice conceded that he thought few would apply but, in bargaining notes, Jaske’s sardonic reply suggests that the news expected a greater number would apply. The question was, however, how many unit employees the News considered would be qualified. The identities provide a basis for argument and negotiations as to possible criteria. Neither was the Guild demanding that the News commit itself to a definitive conclusion on qualification. Again, it merely was seeking to ascertain the News’ own expectation of the potential scope of its proposal and impact. The News ultimately justified its refusal on the grounds that the response called for a “pointless exercise” of burdensome proportion. There was no evidence as to how burdensome the effort would have been. Clearly, if the parties had come to some understanding or expectation that a minimal number of employees would ultimately qualify under the News’ ultimate determination, the Guild may very well have moderated its position. The Guild, as it argues, needed information to place proposal 7 in perspective. It is difficult to believe that the News entered negotiations without having formulated its own expectation of the scope and impact of its proposal, including cost factor analysis, as it had done for its merit pay proposal. Not only did the News refuse to compile the listing except for Taylor’s meaningless classification listing letter, the News proffered no other information to satisfy the Guild’s request to ascertain the News’ scope and impact expectation. Under these factual circumstances, the News was obliged to comply with the request.

4. Conclusion

Upon the foregoing factual findings and analysis, I find that the Respondent News violated Sections 8(a)(5) and (1) of the Act with respect to the unilateral implementation of its proposals regarding merit pay and television assignment on July 5, 1995, and its refusal to furnish the Guild with requested information on April 25, July 10, 11, and August 4, 1995, as alleged in the complaint and as found above.

⁵⁰ The News does not claim, nor could it validly claim, that impasse was reached with respect to proposal 8 merely because it had given the Guild sufficient notice and opportunity to bargain about it which the Guild had ignored in the absence of overall impasse on the contract. *RBE Electronics*, 320 NLRB 80, 81 (1995), citing and discussing *Bottom Line Enterprises*, 302 NLRB 373 (1991).

shared jurisdiction issue was discussed. Toward the strike deadline, Kummer warned the members to prepare for a strike because of the breakdown of the joint bargaining agreement with the Council which he told them was compounded by the implementation of merit pay by the News.

Howe reported to his members the collapse of the joint bargaining agreement and his impression that the DNA was not interested in reaching contract agreements. He reported that other Council members were having problems with the DNA but that they would remain united if there was to be a strike. He did not specify those "problems."

On the Sunday before the strike, a joint membership meeting of DTU Local 18 and GCIU Local 289 was conducted by Ogden, Attard, and two International Union representatives. There was discussion of what was identified as the cause of the lack of bargaining progress, i.e., lack of compliance with the arbitrator's award.

On July 12, the Unions met and discussed a proposed document that had been drafted by Attorney McKnight. The Unions agreed that there was a need to make "a very public commitment to one another" to stand unified and to set forth the reasons they intended to strike. The Unions discussed the unfair labor practices that had been filed regarding joint bargaining and others which were to be filed in the future, including charges with respect to Guild merit pay and DTU Local 18 implementation. On July 12, the principal officers of the six Council Unions signed the following resolution:

Whereas the DNA/Detroit Newspapers (including the News and Free Press) has engaged in anti-union conduct, negotiated in bad faith and reneged on its promise to bargain jointly on economics, the undersigned Unions hereby resolve their members employed at the DNA/Detroit Newspapers each will strike and honor each other's strike in protest of the DNA/Detroit Newspapers (including the News and Free Press) anti-union conduct and unfair labor practices.

The Guild, as the sole Union whose members were employees of the Detroit News and Free Press, signed an additional resolution which provided:

Whereas DNA/Detroit Newspapers, The Detroit News and Detroit Free Press have engaged in anti-union conduct, negotiated in bad faith and committed various unfair labor practices, the Newspaper Guild of Detroit Local 22 hereby resolves that its News and Free Press members will strike in protest of their employer's unfair and illegal conduct and will honor and support the strikes of their brothers and sisters in other unions.

Ogden testified that the unfair labor practices referred to by the resolutions were the bargaining unit issue with respect to DTU Local 18, the merit pay issue with respect to the Guild and the repudiation of the joint bargaining agreement which the officers of the six Unions had previously discussed among themselves.

When the strike commenced on July 13 at 8 p.m., virtually every picket sign except for an isolated exception had either "ULP" or "unfair labor practice" printed or handwritten on it. Derey also testified that a document entitled "Picketing Do's and Don'ts" and another document entitled handbilling "Do's and Don'ts" were passed out to the picket captains and handbilling captains, respectively, a couple of days after the strike. Mleczo, Young, and Howe testified in a similarly fashion. Among the Do's were:

DO explain the reason we are on strike is because the Detroit Newspapers engaged in greedy, anti-union conduct and bad faith bargaining and forced us out on strike.

....
DO explain the reason why you are handbilling—We believe that employees at the Detroit Newspapers were forced out on an unfair labor practice strike because the Company wants to bust our Unions. We are boycotting advertisers who continue to support the Newspapers with their advertising dollars.

Respondent argues that the Union's public statements to their membership and to the media "uniformly referred to the individual economic issues that separated the parties at the bargaining table as the cause of the strike." However, one document cited, entitled "The Alliance," dated July 11 and published by the Council, while referring to nonunfair labor practice issues, does refer to the unilateral imposition of merit pay by the News (and also the shared jurisdiction issue between the DNA and DTU Local 18). Another cited document, a Local 372 newsletter to members similarly includes among a multitude of issues a DNA "refusal to bargain" which arguably could be encompassed within the refusal to bargain in the agreed-upon, two-level bargaining process.⁵¹

The unrefuted record evidence reveals that although the Union frequently did refer to numerous other issues as strike motivations, they did publicly on other occasions refer to one or more of the alleged unfair labor practices or to unfair labor practices generically in literature propagated to members, customers and the public, in addition to the do's and don'ts distributed to members. One entitled "Urgent Update Newspaper Bargaining," prepared before the strike, stated "management has reneged on its commitment to bargain jointly with all six Locals over economic issues."

Numerous communications were prepared by the Unions which referred to the strike as an unfair labor practice strike, duplicated in the hundreds and thousands. Letters given to union members for distribution and mailed to stores selling Respondents' newspapers petitioned such stores to cease the sale of the papers and described the strike as being caused by "numerous unfair labor practices." A letter prepared for Mailers Local 2040 members to use in financial hardship situations described the members as being on strike because of "unfair labor practices."

Other writings prepared for distribution to union members and the general public described the events which preceded and caused the July 13 strike. In early September, 20,000 copies of "The Detroit Union" were published containing an article "Why We Strike" which described DNA's repudiation of its joint bargaining agreement that "shattered the bargaining process." The article described each of the Unions and their specific problems, including unilateral imposition of merit pay at the Detroit News, the DNA's "elimination of critical work protections contained in ongoing agreements" and future elimination of the bargaining unit with respect to DTU Local 18.

⁵¹ Respondent argues that if there had been any unfair labor practice by such conduct, it was cured by Jaske's July 7 offer to bargain individually and then jointly. However, the factual findings above-disclosed subsequent conduct by Jaske which was inconsistent with the agreement.

